Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether evidence of instances of non-uniform enforcement of a neutral, generally applicable law constitutes a "system of individual exemptions" sufficient to trigger strict scrutiny under *Employment Division v. Smith*, 494 U.S. 872 (1990).

2. Whether the existence of a system of individual exemptions requires an exemption for religiously motivated conduct under *Smith*, absent a showing that enforcement imposed a substantial burden on religious exercise.

3. Whether avoiding an Establishment Clause violation constitutes a compelling interest for declining to grant a religious exemption to a neutral, generally applicable law.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Borough of Tenafly is a public entity and municipal corporation; there is no parent or publicly held company owning any of its stock. All other petitioners are individuals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Relevant Constitutional Provisions and Municipal Ordinance	1
Statement of the Case	2
A. Factual Background	3
B. Proceedings Below	5
Reasons for Granting the Petition	8
I. The Court Should Resolve The Disagreement Among The Circuits Over What Constitutes A "System Of Individual Exemptions" Sufficient To Trigger Strict Scrutiny Under *Smith*.	10

Contents

Page

A. The Circuits Are Divided Over The Proper Meaning Of A "System Of Individual Exemptions." 11

1. A "System of Individual Exemptions" Arises Only in the Narrow Unemployment Benefits Context. 11

2. A "System of Individual Exemptions" Exists Only Where A Statute Explicitly Confers Discretion to Make Case-Specific Determinations. 12

3. A "System of Individual Exemptions" Exists Where The Law Itself Distinguishes Between Different Categories of Acts. 14

4. A "System of Individual Exemptions" Is Created By Isolated Instances of Non-Uniform Enforcement of a Law. 16

B. The Third Circuit's Approach Eviscerates *Smith*'s Touchstones of Neutrality and General Applicability. 17

Contents

Page

II. This Court Should Resolve The Split Between The Circuits As To Whether An Exemption From A Neutral, Generally Applicable Law Must Be Given, Even Without A Showing Of A Substantial Burden On Religious Exercise. 18

III. This Court Should Resolve The Split Between The Circuits On Whether Avoiding An Actual Establishment Clause Violation Constitutes A Compelling Interest Against Granting A Religious Exemption. 24

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Altmann v. Minn. Dep't of Corrections, 251 F.3d 1199 (8th Cir. 2001) 24

American Friends Serv. Comm. v. Thornburgh, 951 F.2d 957 (9th Cir. 1991) 15

Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002) .. 21

Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994) 19

Church of Scientology v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993) 22

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ..... *passim*

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) 15-16

Daniels v. Arlington, 246 F.3d 500 (5th Cir. 2001) ... 14

Davey v. Locke, 299 F.3d 748 (9th Cir. 2002) 21

Employment Division v. Smith, 494 U.S. 872 (1990) ..... *passim*

Cited Authorities

Page

Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) 24

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) .. 14, 15, 19

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989) 19

Goodall by Goodall v. Stafford County Sch. Bd., 60 F.3d 168 (4th Cir. 1995) 22, 26, 27

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) .. 20, 21

Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992) 11-12

Keeler v. Mayor and City Council of Cumberland, 940 F. Supp. 879 (D. Md. 1996) 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) 7

Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) 22

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) 6, 7

Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) 12

Cited Authorities

Page

Rector of St. Bartholomews Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) 13, 14

Sherbert v. Verner, 374 U.S. 398 (1963) ..... *passim*

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) ... 24, 26, 27

Swanson v. Guthrie v. Indep. School Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998) 15

United States v. Grant, 117 F.3d 788 (5th Cir. 1997) 24

Vandiver v. Hardin County Board of Education, 925 F.2d 927 (6th Cir. 1991) 14

Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994) 21

STATE CASES

First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) 12

Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 963 P.2d 1315 (Hawaii 1998) 12

Cited Authorities

Page

UNITED STATES CONSTITUTION

First Amendment 1, 6

Fourteenth Amendment 2

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000cc 13

OTHER AUTHORITIES

Tenafly, N.J., Ordinance 691 Article VIII(7) (1954) 2, 4, 6

Douglas Laycock, Religious Freedom and International Human Rights in the United States Today, 12 Emory Int'l L. Rev. 951 (1998) 17

TABLE OF APPENDICES

	Page
Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed October 24, 2002	1a
Appendix B — Opinion And Order Of The United States District Court For The District Of New Jersey Dated And Filed August 9, 2001	62a
Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated And Filed November 20, 2002	173a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Bassler, D.J.) denying a preliminary injunction and dissolving existing restraints (Appendix ("Pet. App.") 62a-172a) is published at 155 F. Supp. 2d 142. The court of appeals' opinion (per Ambro, J.) reversing the District Court and ordering a preliminary injunction (Pet. App. 1a-59a) is published at 309 F.3d 144. The court of appeals' order denying rehearing and rehearing *en banc* (*id.* 173a-174a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on August 9, 2002 and denied rehearing and rehearing *en banc* on November 20, 2002. Justice Souter subsequently extended the time to file this petition for a writ of certiorari to and including April 19, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND MUNICIPAL ORDINANCE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV §1.

> No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.

Tenafly, N.J., Ordinance 691 Article VIII (7) (1954).

STATEMENT OF THE CASE

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that a "neutral law of general applicability" need not be subject to strict scrutiny even if the law has the incidental effect of burdening a particular religious practice. The Court went to some length to distinguish its prior holding in *Sherbert v. Verner*, 374 U.S 398 (1963), which had held that, under some circumstances, the Free Exercise Clause requires courts to carve out an exemption from a generally applicable law if: (i) the law substantially burdens a claimant's free exercise of a sincere religious belief; and (ii) the state cannot demonstrate that denying the claimant an exemption is necessary to serve a compelling state interest.

After noting that *Sherbert*'s applicability had been limited to "denial of unemployment compensation" cases, *Smith*, 494 U.S. at 883, the Court further narrowed *Sherbert*'s reach — even in the unemployment benefits context — to those situations in which "the State has in place a *system of individual exemptions*, [which] it may not refuse to extend . . . to cases of 'religious hardship' without compelling reason," *id.* at 884 (emphasis added) (internal citation omitted).

This petition presents important questions, on which the circuits are divided, regarding two distinct aspects of *Smith*'s limitation of *Sherbert*: first, whether evidence of instances of non-uniform enforcement of a neutral, generally applicable law is sufficient to trigger strict scrutiny under *Smith*; and second, whether under *Smith*'s individual exemptions model a substantial burden on religious exercise remains a necessary condition for requiring that an exemption be extended to religiously motivated conduct. The petition further presents another important question on which the circuits are divided: whether avoiding an Establishment Clause violation constitutes a compelling interest for government to deny an exemption for religiously motivated conduct.

A. Factual Background

The facts in *Tenafly* are straightforward and well developed. This case began when Respondent Tenafly Eruv Association, Inc. ("TEAI") approached first the Mayor, and then the Borough Council of Tenafly, N.J., with a request for a religious accommodation on utility poles within the Borough's right-of-way: TEAI sought to erect a permanent *eruv*, a notional wall or enclosure that, under Jewish law, permits observant Jews to carry and push objects in the public domain on the Sabbath. From the start, the Respondent TEAI

represented the *eruv* as a structure with religious significance; it informed the mayor that the *eruv* would enhance the quality of its members' religious lives.

A neutral, generally applicable Tenafly ordinance, enacted in 1954, specifies that "[n]o person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, N.J., Ordinance 691 Article VIII (7) (1954). Respondent thus sought a religious exemption from the ordinance in order to place rubber stripping on the municipally-controlled utility poles to create the upright sections of the eruv. Respondent's application to the Borough Council therefore amounted to a request for an amended or new ordinance that would have permitted TEAI to use the utility poles on a permanent basis for a religious purpose.

The Tenafly Borough Council, recognizing that the ordinance prohibited attachment of the rubber stripping, declined to amend the ordinance so as to permit an exemption for religiously motivated use of the poles. The Borough Council reasoned that it would violate the Establishment Clause to grant a religious group preferential access to government property that was otherwise closed to public use.

No evidence was presented, nor was an allegation made, that anyone had ever sought an exemption from the ordinance before TEAI did so. There is no dispute either as to the existence of incomplete enforcement of Ordinance 691. Respondent introduced into evidence four photographs of street address numbers nailed into utility poles in violation of the ordinance, as well as two "lost pet" signs and two

"office for rent" signs. The Court referred to these items as "lost animal signs and other private postings" in the decision, Pet. App. at 3a, and found they had remained in place for some days without being removed. Evidence also showed that two local churches had posted directional signs on property that was determined by the District Court to have been municipal. In addition, each year during the winter holiday season, the Borough affixes seasonal decorations, paid for by the local Chamber of Commerce, to utility poles in the downtown area.[1]

B. Proceedings Below

TEAI and several individuals sued in the U.S. District Court for New Jersey, alleging free exercise, free speech, and Fair Housing Act violations, and sought a preliminary injunction against removal of the rubber strips. After hearing three days of testimony and oral argument, the District Court denied the injunction. Pet. App. at 62a. Relying on *Smith*, the District Court held that the Borough was under no duty to grant an exemption to its neutral, generally applicable ordinance. It also held that the utility poles were a non-public forum that could be closed to public speech, and dismissed the Fair Housing Act claims for lack of standing. *Id.* at 126a-142a, 156a-164a. The District Court further found that there was "*no evidence* to support a conclusion that the Borough Council acted out of animosity to Judaism in general or to Orthodox Jews in particular." Pet. App. at 146a-147a (emphasis added). Rather, "the fundamental reason animating

1. The Third Circuit also said that on one occasion "[o]range ribbons [signifying opposition to school regionalization] were attached to the Borough's utility poles for a lengthy period of time" and that Borough officials knew about them but made no effort to remove them, Pet App. 36a, a factual assertion about which the District Court said there was insufficient evidence in the record. *Id.* at 136a.

the Borough Council's decision was its concern that public property should not be permanently allocated to a religious purpose." *Id.* at 148a.

Respondent appealed to the Third Circuit, which reversed on free exercise grounds.[2] The Third Circuit found that the Borough "tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious — though never Orthodox Jewish — purposes," *id.* at 35a-36a, "making those actions sufficiently suggestive of discriminatory intent." *Id.* at 37a. According to the Court, this "selective, discretionary application of Ordinance 691," *id.* at 37a, was sufficient to trigger strict scrutiny under *Smith*. The court acknowledged that "if the Borough had enforced [Ordinance 691] uniformly, *Smith* would control and the [Respondent's] claim would accordingly fail." *Id.* at 35a. According to the Third Circuit, in-practice discretionary enforcement of the "often-dormant Ordinance 691" amounted to an instance of individualized exemption sufficient to trigger strict scrutiny, because by enforcing the ordinance against Respondent, the Borough implicitly "devalue[d]" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than non-religious reasons." *Id.* at 37a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)).

The Third Circuit then rejected the argument that Respondent's request for an exemption to use government property for religious purposes was governed by *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which denied a free exercise claim by American

2. The Third Circuit held that the rubber stripping did not constitute speech for First Amendment purposes, and it sustained the District Court's denial of the Fair Housing Act claim.

Indians seeking to block construction on federal lands sacred to the Indians. The Court distinguished *Lyng* by saying that Respondent's request for an exemption was not a request for "preferential treatment," but rather a request "that the borough not invoke an ordinance from which others are *effectively exempt*." Pet. App. at 40a (emphasis added).

The Third Circuit went on to hold that, under *Smith* and *Lukumi*, "there is no substantial burden requirement when government discriminates against religious conduct" by differential enforcement via individualized exemptions. *Id.* The Third Circuit reasoned that, because *Smith* warned against "judging the centrality of different religious practices," *id.* (citing *Smith*, 494 U.S. at 887), it followed that the existence of a substantial burden was irrelevant under circumstances of individualized exemptions. The Third Circuit said that it was joining the Sixth Circuit against the weight of contrary decisions from the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits.

Finally, the Third Circuit held that the Borough of Tenafly had no compelling interest in avoiding the Establishment Clause violation that would have flowed from giving a religiously motivated applicant preferential access to government property. *Id.* at 49a. Dismissing the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in favor of an endorsement test, the Court said that a reasonable, informed observer would know that Respondent's conduct was religious and preferentially treated, "but would also know that the Borough was allowing [the rubber strips] to remain on utility poles only because its selective application of Ordinance 691 render[ed] removing the lechis a free exercise violation." *Id.* In essence, said the Third Circuit, "the Borough has no Establishment Clause justification for discriminating against the plaintiffs' religiously motivated conduct." *Id.* at 57a.

REASONS FOR GRANTING THE PETITION

It is well established under *Employment Division v. Smith* that a neutral, generally applicable law does not trigger strict scrutiny even when it has the incidental effect of burdening religiously motivated conduct. In so holding in *Smith*, however, the Court distinguished several cases in the unemployment context in which it had required strict scrutiny:[3] "our decisions in the unemployment cases stand for the proposition that where the State has in place a *system of individual exemptions*, it may not refuse to extend *that system* to cases of religious hardship' without compelling reason." *Smith*, 496 U.S. at 884 (emphasis added) (internal citation omitted). The Court further clarified the *Smith* touchstones of neutrality and general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, when it held that a law is not neutral if "the object of the law is to infringe upon or restrict religious practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. To determine the law's objective, the Court first examined the text of the law and second, the motivation behind the law. The Court's failure to explicate further the meaning of a "system of individual exemptions" and how it affects the neutrality and general applicability of a law has caused much confusion in the lower courts' free exercise jurisprudence.

An array of different tests has arisen in the circuits to define a "system of individual exemptions"; in its *Tenafly*

3. The *Smith* Court also distinguished cases it said involved "hybrid situation[s]," where not only free exercise, but other constitutional protections, such as freedom of speech and of the press, were involved. *Smith*, 494 U.S. at 881-82. Such a situation did not arise in this case, where the Third Circuit held that freedom of speech was not implicated because the rubber stripping did not constitute speech.

decision, the Third Circuit staked out the most radical position of any court to have addressed the issue. First, it held that evidence of non-uniform enforcement of a general, neutrally applicable law amounted to a system of exemptions sufficient to trigger strict scrutiny under the individualized exemptions prong of *Smith*. Second, the Third Circuit held that no showing of a substantial burden to religious exercise was necessary to require that an exemption be extended to religiously motivated conduct. Together and separately, these two holdings eviscerate *Smith*. Under the Third Circuit's tests, every time it can be shown that government has failed to perfectly enforce a neutral, generally applicable law, government must then grant blanket exemptions for any religiously motivated conduct, regardless of whether the neutral law substantially burdens the conduct in question.

The Third Circuit then compounded its extreme position by holding that avoiding an actual violation of the Establishment Clause cannot be a compelling reason to decline to grant a religiously-motivated exemption from a neutral, generally applicable law. This holding also conflicts with other circuits, which have held that avoiding an Establishment Clause violation constitutes a compelling state interest.

I. THE COURT SHOULD RESOLVE THE DISAGREEMENT AMONG THE CIRCUITS OVER WHAT CONSTITUTES A "SYSTEM OF INDIVIDUAL EXEMPTIONS" SUFFICIENT TO TRIGGER STRICT SCRUTINY UNDER *SMITH*.

Several interpretations of the "system of individual exemptions" have appeared in the federal courts. These interpretations can be arrayed along a continuum, from narrowest to most expansive. The narrowest understanding of *Smith* is that a "system of individual exemptions" arises only in the unemployment benefits context, as it did in *Sherbert*. A slightly broader reading interprets *Smith* to mean that a "system of individual exemptions" only exists where, by analogy to the unemployment context, the law in question expressly confers discretion on a government official to make case-specific determinations under the terms of the law, such as zoning determinations. A strikingly broader interpretation of *Smith* finds a "system of individual exemptions" to exist whenever a law by its terms distinguishes between different categories of acts, permitting some and prohibiting others. Finally, the most expansive reading of *Smith*, adopted by the Third Circuit in the *Tenafly* decision, holds that a "system of individual exemptions" can arise merely from authorities' incomplete enforcement of a neutral, generally applicable law.

It emerges from this continuum of interpretations of *Smith*'s category of "a system of individual exemptions" that there exists great uncertainty among the courts about where and how this category applies. The Third Circuit in *Tenafly* adopted the most extreme view of any court to date when it held that non-uniform enforcement of a neutral and generally applicable law amounted to such a system. The effect of the

rule is to gut *Smith* by reinstating the *Sherbert* test wherever it can be shown that a statute has not been enforced with perfect uniformity — which is to say, nearly always. The *Tenafly* case is worthy of being granted certiorari to clarify the meaning of the "system of individual exemptions" category of *Smith*.

A. The Circuits Are Divided Over The Proper Meaning Of A "System Of Individual Exemptions."

There are in the various circuits a range of other opinions of what constitutes a system of individual exemptions, and the Third Circuit's view deepens the split among them.

1. A "System of Individual Exemptions" Arises Only in the Narrow Unemployment Benefits Context. In *Smith*, the Court pointed out that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation," 494 U.S. at 883, in which "the State has in place a system of individual exemptions," *id.* at 884. Where such a system exists, government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (internal citation omitted). The Court's language would seem to imply that the system of individual exemptions mentioned by *Smith* is quite literally restricted to the unemployment benefits context. *See* 494 U.S. at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."); *id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."). Indeed, one lower federal district court has so held. *See Jane*

L. v. Bangerter, 794 F. Supp. 1537, 1547 n.10 (D. Utah 1992) ("The Supreme Court has expressly stated that the holding regarding statutes with individual exemptions applies only in the unemployment compensation context.") (*citing Smith*, 494 U.S. at 883-84).

2. A "System of Individual Exemptions" Exists Only Where A Statute Explicitly Confers Discretion to Make Case-Specific Determinations. Several courts have held that a system of individual exemptions exists only where a statute confers discretion on a government official or officials to make case-specific determinations under the general terms of the law. This position has arisen most prominently in the zoning context. *See First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (*en banc*) (holding that local landmark ordinances triggered strict scrutiny because "they invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions" in the form of variances); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 963 P.2d 1315, 1345 n.31 (Hawaii 1998) (holding that a zoning law that provided for variances "clearly creates a 'system of individualized exemptions' from the general zoning law"); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879, 885-86 (D. Md. 1996) (holding that a historic preservation ordinance giving a landmark commission the right to preserve buildings "of unusual importance to the City, State or nation" triggered strict scrutiny because it provided for a system of individualized exemptions); *Rader v. Johnston*, 924 F. Supp. 1540, 1552 (D. Neb. 1996) (holding that a system of individualized exemptions exists where "administrators grant exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not well defined or limited").

Perhaps more importantly, the view that discretionary zoning determinations amount to a "system of individual exemptions" under *Smith* would appear to underlie the logic of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (RLUIPA). RLUIPA, which seeks to reinstate strict scrutiny and the *Sherbert* compelling state interest test under a range of conditions, applies, *inter alia*, where a

> substantial burden [to religious exercise] is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. 42 U.S.C. § 2000cc (a)(2)(C).

The language of RLUIPA is apparently intended to track the individual exemptions language of *Smith*. For RLUIPA to be plausibly constitutional it is necessary for "individualized assessments of . . . proposed uses" of property to amount to a system of individual exemptions under *Smith*.

The view that zoning or other discretionary government decisions amounts to a "system of individual exemptions" under *Smith* has, however, been rejected by several circuit courts, which have held that the mere conferral of discretion does not create a system of individual exemptions absent some evidence of actual systematic discrimination under the guise of discretion. Thus in *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990), the Second Circuit rejected the claim that the New York City landmarks law, which required designating

as a landmark any property of historical or aesthetic importance, triggered strict scrutiny because landmark status was determined by the discretionary judgment of a government official as to whether a given property had historical or aesthetic importance. Instead the Second Circuit held that the New York City landmarks law was neutral and of general applicability. Accordingly, the court said, it was of "no constitutional relevance" that the law allowed for exercise of discretion "absent proof of the discriminatory exercise of discretion." *Id.* at 355. In *Daniels v. Arlington*, 246 F.3d 500, 505 (5th Cir. 2001), the Fifth Circuit considered a police regulation that banned the wearing of pins on police uniforms unless approved by the police chief. It held that because, under *Smith*, the regulation was "facially neutral and generally applicable," it did not trigger strict scrutiny. *Id.* This was so even though the regulation on its face permitted those pins that the police chief might deem appropriate. Likewise the Sixth Circuit has similarly held that conferral of discretion does not, by itself, institute a system of individual exemptions. *See Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991) ("individualized exemptions" prong of *Smith* "does not extend to a local school board's decision to select one of the two available methods for awarding academic credits to transferees into the public schools, as long as that decision is unaccompanied by any evidence of discriminatory intent against religion").

3. A "System of Individual Exemptions" Exists Where The Law Itself Distinguishes Between Different Categories of Acts. The Third Circuit adopted this view in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (*FOP*), which involved a challenge to a Newark police regulation that prohibited the wearing of beards by officers, but made a medical

exception for persons suffering from skin disease. The Court held that the regulation amounted to a system of individual exemptions and triggered strict scrutiny because it provided in its terms for an exception for non-religious reasons, namely health. *See FOP*, 170 F.3d at 364-65.

Several other circuits have rejected this view, holding instead that categorical exceptions do not on their own amount to a system of individual exemptions. In *American Friends Serv. Comm. v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991), a Quaker organization sought an exemption from the Immigration Reform and Control Act, and argued that the Act created a system of individual exemptions because "the 'employer sanction' provisions contain exceptions for independent contractors, household employees and employees hired prior to November, 1986." *Id.* at 961. The Ninth Circuit rejected this argument: "But those exceptions exclude entire, objectively-defined categories of employees from the scope of the statute; they are not 'individualized exemptions' within the meaning of *Smith*." *Id.* What is more, the Court said, the statute created "no procedures whereby anyone 'applies' for any of these exemptions," and therefore "does not set up a procedure for exemptions based on 'individualized governmental assessment of the reasons for the relevant conduct' that would bring the [*Smith*] exception into play." *Id.* Similarly in *Swanson v. Guthrie v. Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998), the Tenth Circuit held that a school district's excepting fifth-year seniors and special education students from its "no-part-time-attendance" policy did not require strict scrutiny of refusal to allow a Christian home-schooled student to attend part-time, because these were categorical exemptions written into the school's policy. *See also Cornerstone Bible Church v.*

City of Hastings, 948 F.2d 464 (8th Cir. 1991) (holding that a zoning ordinance excluding church from commercial area is neutral law of general applicability).

4. A "System of Individual Exemptions" Is Created By Isolated Instances of Non-Uniform Enforcement of a Law. The most extreme position has now been advanced by the Third Circuit, which in the *Tenafly* decision held that evidence of several isolated instances of non-uniform enforcement of a neutral ordinance, standing alone, was sufficient to trigger strict scrutiny.[4] On this view, if government officials ever, through exercise of enforcement and prosecutorial discretion, fail to enforce a statute against non-religious conduct, then strict scrutiny is triggered, and the officials are barred from enforcing the law against religiously-motivated conduct. In *Tenafly*, the Third Circuit acknowledged expressly that the Tenafly ordinance barring attachment of any material to utility poles was neutral and generally applicable. It stated explicitly that if the Borough had enforced its ordinance "uniformly," then *Smith* "would control." Pet. App. at 35a. But the Borough's failure to enforce the law in four instances was sufficient for the Third Circuit to conclude that the Borough "tacitly or expressly granted exemptions from the ordinance's unyielding language." *Id.* at 35a-36a. By seeking to "apply" an ordinance that was "often-dormant" against the attachment of rubber stripping, the court said, Tenafly Borough created a system of individual exemptions that triggered strict scrutiny.

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4. The Third Circuit's position that non-uniform enforcement of a neutral, generally applicable law constitutes a system of individual exemptions is so extreme that no other court has so held. Indeed, no party argued this position before the Third Circuit, and no other court has even considered the theory that non-uniform enforcement, standing alone, can trigger strict scrutiny.

Although there was neither evidence nor even an allegation that anyone had ever sought an exemption from the ordinance before TEAI did so, the Third Circuit borrowed the language of selective prosecution to say that the "selective, discretionary" enforcement, *id.* at 37a, enabled government to consider "the reasons for the relevant conduct." Following this reasoning, the Third Circuit asserted that TEAI was "not asking for preferential treatment," *id.* at 40a, even though TEAI was seeking an exemption from a neutral statute. Rather, the court claimed, TEAI was "ask[ing] only that the Borough not invoke an ordinance from which others are effectively exempt." *Id.* The evidence of exemption was simply the four instances of non-uniform enforcement cited by the court. In other words, the fact of occasional non-uniform enforcement was held to require the granting of a statutory exemption for religiously motivated conduct.

B. The Third Circuit's Approach Eviscerates *Smith*'s Touchstones of Neutrality and General Applicability.

The Third Circuit's interpretation of *Smith* in *Tenafly* essentially reinstates *Sherbert* as the default rule for free exercise analysis. The holding in *Tenafly* may be understood as part of a concerted effort to eviscerate *Smith* that has been advocated by several prominent academics and numerous activist organizations. The *Tenafly* holding is even more extreme than the view that, in the words of one leading scholar, "religious practices are entitled to exceptions from regulatory laws in any situation where some secular practice also gets an exception," Douglas Laycock, Religious Freedom and International Human Rights in the United States Today, 12 Emory Int'l L. Rev. 951, 967 (1998).

The reason that the *Tenafly* decision eviscerates *Smith* is that, because of prosecutorial discretion and incomplete enforcement, nearly every law may be shown not to have been enforced under some circumstances. If strict scrutiny is triggered by non-uniform application of neutral, generally applicable laws, then strict scrutiny will be a ubiquitous element in the free exercise context. In practice, those who can assert religious motivations for illegal conduct will nearly always be able to get an exemption provided they can show instances of non-enforcement. By analogy, in a case like *Smith* itself, in which drug laws were being challenged on free exercise grounds, evidence of prosecutorial discretion in the enforcement of drug laws would similarly have triggered strict scrutiny.

II. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE CIRCUITS AS TO WHETHER AN EXEMPTION FROM A NEUTRAL, GENERALLY APPLICABLE LAW MUST BE GIVEN, EVEN WITHOUT A SHOWING OF A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

The courts of appeals disagree as to whether substantial burden analysis is required where, as in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a law directly targets religious exercise. In *Lukumi*, where the Court held the laws in question to be specifically and only targeted at the Santeria religion, there was no detailed analysis of the substantial burden issue. *See Lukumi*, 508 U.S. at 531-47. But the *Lukumi* Court began its analysis by acknowledging the centrality of the religious practice of animal sacrifice at the heart of the case to Santeria practitioners' religious exercise. The Court stated that "petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be deemed bizarre or

incredible,'" 508 U.S. at 531 (citing *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834, n.2 (1989)). The Court further specified that "[n]either the city nor the courts below . . . have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons." 508 U.S. at 531. By omitting a detailed substantial burden analysis, while crediting the claim of centrality and noting that the issue was not raised below, the *Lukumi* Court created some ambiguity on the question of whether substantial burden analysis was required where a non-neutral law directly targeted a specific, identifiable religious practice.

Seizing upon that ambiguity in *Lukumi*, the Third Circuit held, first in *Borough of Mahaffey*, 35 F.3d at 849-50, and again in *Tenafly*, that where a law is not neutral and generally applicable, but discriminates against religion, substantial burden analysis is not necessary. Based on a reading of *Smith* and *Lukumi* that has been gestating within the Third Circuit for several years, the Third Circuit in *Tenafly* has developed a test for violation of the Free Exercise Clause that omits any consideration of whether a claimant's religious exercise has been substantially burdened.[5] First the Court determines whether discrimination has occurred. A finding of discrimination may be satisfied by mere evidence that a neutral, generally applicable law has been incompletely enforced. If "discrimination" is found, the court then decides whether there was a compelling interest for that discrimination. If there is no finding of compelling interest, the Third Circuit holds that the remedy is to compel government to exempt any religiously motivated conduct — but not other conduct — from the law in question.

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5. *See FOP*, 170 F.3d at 364-67 and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-850 (3d Cir. 1994).

Thus, having concluded that the non-uniform enforcement of the Tenafly sign ordinance constituted a system of individual exemptions under *Smith*, the Third Circuit went on to demand strict scrutiny even absent a showing that the ordinance substantially burdened religious exercise.[6] The court flatly stated that "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. This proposition is flatly wrong.

Although no other circuit has abolished substantial burden analysis entirely,[7] two other circuits have joined the Third Circuit in holding that substantial burden analysis is unnecessary where a law directly targets religious exercise as it did in *Lukumi*. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the Sixth Circuit evaluated a military regulation that completely banned certified child care providers from inculcating religion to their charges. The court explained that this regulation was not neutral or generally applicable, but targeted religious activity. *Id.* at 978. Therefore, the court said, it was not necessary to show a substantial burden. *Id.* at 979 n.4. At the same time, the Sixth Circuit made it very clear that the *Sherbert* test was still appropriate "to judge those situations in which a neutral and generally applicable regulation imposes an indirect, albeit substantial, burden on the practice of religion."

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6. The Borough has asserted throughout the case that Respondents cannot make out a showing of a substantial burden. Neither the district court nor the Third Circuit found that the Respondents had been subjected to a substantial burden to their religious exercise.

7. The Third Circuit acknowledged as much in a long if imprecise footnote citing cases from nine circuits that disagreed. *See* Pet. App. 42a, n.31.

Id. at 979 n.3. Thus, the Sixth Circuit agreed with the Third Circuit that under *Lukumi*, where a law is not neutral and generally applicable, substantial burden analysis is not required, but it disagreed with the Third Circuit regarding a system of individual exemptions, and it held expressly that where a law *is* neutral and generally applicable, the substantial burden test applies.

The Ninth Circuit shares the same view as the Sixth. *See Davey v. Locke*, 299 F.3d 748, 753-54 (9th Cir. 2002); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994); and *Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). In *Davey*, the court held that a Washington statute that denied funding to students studying theology from a religious perspective targeted religious conduct and was not neutral or generally applicable. The court applied strict scrutiny under *Lukumi* without addressing the substantial burden question. In *Vernon*, the Ninth Circuit applied the *Sherbert* test with the requirement of a substantial burden. In *Am. Family Ass'n*, the Ninth Circuit posited a distinction between a "law targeting religious beliefs" under *Lukumi* and government action that was not "regulatory, proscriptive or compulsory," *i.e.* "something other than an actual law." 277 F.3d at 1124. It held that a substantial burden was required in the latter situation. The Ninth Circuit thus appears to agree with the Third and Sixth Circuits that a law targeting religion under *Lukumi* need not substantially burden religion to be subject to strict scrutiny, but like the Sixth Circuit, it requires a substantial burden when *Sherbert* applies.

On the other side of the *Lukumi* split are those courts that require a substantial burden before the Free Exercise Clause is implicated, and hence would require a substantial

burden even where *Lukumi* applied. In *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002), the D.C. Circuit held in no uncertain terms that "the First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice." The *Levitan* court specifically cited *Lukumi* for the proposition that the Free Exercise Clause is only implicated where there is a substantial burden to religious exercise. *Id.* at 1321 (describing *Lukumi* as a case "in which the practice at issue is indisputably an important component of the litigants' religious scheme") (emphasis added). In *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), the Fourth Circuit held that if a law were not generally applicable, the substantial burden requirement would still apply. Analyzing the appellant's claim under the substantial burden standard, the court found that it did not rise to the level of substantiality when the claimed burden was increased cost. *Id.* at 171. In *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993), the Eleventh Circuit, after finding that *Smith* did not apply to an ordinance that targeted religious and charitable activities, *id.* at 1543, said explicitly that "[u]nder the Free Exercise Clause we apply strict scrutiny to legislation that imposes a substantial burden on the observation of a religious belief or practice," *id.* at 1549. That is, the Eleventh Circuit requires a finding of a substantial burden before it finds the Free Exercise Clause implicated by a law that targets religious activity in particular.

It thus follows that on the question whether substantial burden analysis is required even where *Lukumi* applies, there exists a split between the Third, Sixth, and Ninth Circuits on the one side, and the D.C., Fourth, and Eleventh Circuits on the other.

The Third Circuit is alone, however, in its remarkable holding that *Smith* permanently abolished all substantial burden analysis in any context. In so holding in *Tenafly*, the Third Circuit relied on *Smith*'s language admonishing courts to avoid "[j]udging the centrality of different religious practices," 494 U.S. at 887. From this language, the Third Circuit concluded that, even where a system of individual exemptions triggers the old *Sherbert* test, a substantial burden to religious exercise is no longer needed after *Smith*. Pet. App. at 41a. But *Smith*'s warning against the dangers of weighing religious importance was intended to explain why courts should not force states to grant exemptions to neutral, generally applicable laws. It was not intended to hold that courts must force states to grant those exemptions even absent a substantial burden.

Smith did not create some new version of the *Sherbert* test. In characterizing *Sherbert* as a case involving a system of individual exemptions, the *Smith* Court did no more than preserve the *Sherbert* test in certain circumstances. *Sherbert* expressly requires a finding of substantial burden to religious exercise before the state may be called upon to show a compelling interest. It cannot possibly follow that under *Smith*, the substantial burden requirement of *Sherbert* was somehow lifted.

In other words, the Third Circuit has turned the logic of *Smith* on its head. In the Third Circuit's view, *Smith* actually makes it easier, not more difficult, for a private party to insist that the state provide a statutory exemption for religiously motivated conduct. No other circuit has held that, where a system of individual exemptions to a neutral, generally applicable law exists, strict scrutiny is triggered even absent a substantial burden to religious exercise. To the contrary,

the other circuits require a showing of a substantial burden whenever they apply strict scrutiny after *Smith*. The Third Circuit acknowledged as much in its decision in this matter. *See* Pet. App. 42a, n.31 (citing, *inter alia*, *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (applying strict scrutiny only where government "has placed a substantial burden on the observation of a central belief or practice") (internal quotation marks omitted) (emphasis in original); *United States v. Grant*, 117 F.3d 788, 793 (5th Cir. 1997) (applying substantial burden test to supervised release order and finding no free exercise violation in the absence of a substantial burden); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994) (requiring substantial burden as prerequisite for free exercise claim and concluding that school's reading program did not substantially burden parents' free exercise); *Altman v. Minn. Dep't of Corrections*, 251 F.3d 1199, 1204 (8th Cir. 2001) ("Government significantly burdens the exercise of religion if it significantly constrains conduct or expression that manifests a central tenet of a person's religious beliefs, meaningfully curtails the ability to express adherence to a particular faith, or denies reasonable opportunities to engage in fundamental religious activities.")). The Third Circuit thus stands alone in its extraordinary interpretation of *Smith*.

III. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE CIRCUITS ON WHETHER AVOIDING AN ACTUAL ESTABLISHMENT CLAUSE VIOLATION CONSTITUTES A COMPELLING INTEREST AGAINST GRANTING A RELIGIOUS EXEMPTION.

The Third Circuit considered and rejected the holding, adopted by the District Court, that even if it were appropriate to subject the ordinance to strict scrutiny, the Borough

was justified in its actions by a compelling governmental interest in avoiding an Establishment Clause violation. The Establishment Clause would be violated, the District Court said, by affording preferential use of closed government property to a religious group. Pet. App. at 149a-156a. The Third Circuit applied the endorsement test to the government conduct. It acknowledged that if the Borough had provided a religious exemption for the rubber stripping, then a reasonable, informed observer would know that TEAI was a religious organization that was being preferentially treated. "[B]ut," said the court, a reasonable observer "would also know that the borough was allowing [the rubber strips] to remain on utility poles only because its selective application of Ordinance 691 render[ed] removing the lechis a free exercise violation." Pet. App. at 55a.

The court's holding logically depends on the assumption that denial of the exemption to TEAI amounted to a free exercise violation. Preferential treatment of a religious group that would normally violate the Establishment Clause, the court held, would not violate that Clause *because the conduct results from an obligation that follows from a free exercise violation*. But this circular reasoning puts the cart before the horse. The Borough had not yet violated the Free Exercise Clause when TEAI approached it requesting an exemption for its religiously motivated conduct. The very question before the Court, then, was whether the Borough committed a free exercise violation by refusing to grant an exemption that would preferentially treat religious conduct. If there were a compelling interest for the refusal, then no free exercise violation would exist. The Third Circuit's conclusion amounts to the holding that, where denying a religiously motivated exemption could be construed as a free exercise

violation, an Establishment Clause violation cannot be a compelling state interest for denying the exemption.

It follows from the Third Circuit's reasoning that avoiding an Establishment Clause violation can never constitute a compelling interest for refusing a religious exemption. After *Smith*, the only situation in which a compelling interest is ever required is one in which there exists a system of individual exemptions or a hybrid free exercise claim. In the view of the Third Circuit, it would always constitute "discrimination" to deny an exemption to a religious group under these circumstances. Thus the Third Circuit now denies that avoiding an Establishment Clause violation can ever constitute a compelling state interest in the free exercise context.

This holding places the Third Circuit in conflict with two circuits that have held that avoiding an Establishment Clause violation does constitute a compelling state interest. In *Goodall*, *supra*, the Fourth Circuit considered the claim that it was a free exercise violation to deny state support for the religious education of a deaf child. Stating that "[i]t is the well-settled law of the Fourth Circuit that the avoidance of a violation of the Establishment Clause of the First Amendment constitutes such a compelling state interest," 930 F.2d. at 370, the court, applying *Sherbert*, declined to find a free exercise violation on the theory that providing the funding would violate the Establishment Clause.

The First Circuit reached a similar conclusion in *Strout v. Albanese*, *supra*, in assessing the constitutionality of a Maine law that barred direct state support for religious schools. The court held: "We highlight the proposition that in some cases in which state infringement on the free exercise

of religion takes place, otherwise prohibited conduct may be permitted if the state establishes an overriding societal interest. Upholding the Establishment Clause . . . is such a paramount interest." 178 F.3d at 61. In both *Goodall* and *Strout*, there would arguably have been no Establishment Clause violation had a reasonable observer known that the special accommodation for religion was being made as a result of a free exercise violation. The Third Circuit is thus in conflict with the First and Fourth Circuits on the important question of whether avoiding an Establishment Clause violation is a compelling interest that justifies what would otherwise be a free exercise violation. This Court should grant certiorari to resolve the split.

CONCLUSION

For the reasons outlined above, Petitioners respectfully request that this Court grant the within Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 24, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3301

TENAFLY ERUV ASSOCIATION, INC.; CHAIM BOOK; YOSIFA BOOK; STEPHANIE DARDICK GOTTLIEB; STEPHEN BRENNER,

Appellants

v.

THE BOROUGH OF TENAFLY; ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly; CHARLES LIPSON; MARTHA B KERGE; RICHARD WILSON; ARTHUR PECK; JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Action No. 00-cv-06051)
District Judge: Honorable William G. Bassler

Argued March 21, 2002

Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

(Opinion filed October 24, 2002)

* * *

Appendix A

OPINION OF THE COURT

AMBRO, *Circuit Judge.*

The primary issues presented in this appeal from the District Court's order denying preliminary injunctive relief are whether the Free Speech and Free Exercise Clauses of the First Amendment allow the Borough of Tenafly, New Jersey, which has permitted various secularly motivated violations of a facially neutral ordinance, to invoke that ordinance against comparable religiously motivated acts by Orthodox Jews. Because there is no evidence that the acts in question are expressive, we hold that the Free Speech Clause does not apply. We further hold, however, that the Borough's selective enforcement of its ordinance likely violated the Free Exercise Clause. Because the other requirements for injunctive relief are satisfied, we reverse and direct the District Court to issue a preliminary injunction.

I. Background

An ordinance in the Borough of Tenafly, which encompasses 4.4 square miles and has a population of 13,806,[1] provides in pertinent part: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, N.J., Ordinance 691 Article VIII(7) (1954).[2] Although Ordinance

1. *See* Borough of Tenafly, *About Tenafly*, at http://www.tenaflynj.org/about.htm (last visited September 20, 2002).

2. Our description of the facts is based on our independent review of the record because, as explained in more detail below, the (Cont'd)

691 does not allow Borough officials to make exceptions on a case-by-case basis, in practice they have often done so. House number signs nailed to utility poles in plain view are frequently left in place. Local churches are tacitly allowed to post permanent directional signs bearing crosses on municipal property. Lost animal signs and other private postings often remain undisturbed by Borough officials. Orange ribbons were affixed to utility poles "for a lengthy period of time" by supporters of the local high school during a protracted controversy over school regionalization, but Borough officials made no effort to remove them. Every year, officials in the small community permit the local Chamber of Commerce to affix holiday displays to the Borough's utility poles for approximately six weeks during the Christmas holiday season. Red ribbons, wreaths, and seasonal holiday lights are attached to the Borough's utility poles as part of these displays.

The plaintiffs in this case are Orthodox Jewish residents of Tenafly[3] whose faith forbids them from pushing or carrying

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(Cont'd)
First Amendment bars us from deferring to the District Court's factual findings unless they involve witness credibility. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

3. Tenafly Eruv Association, Inc. ("TEAI") is an organization formed to promote the creation of an *eruv* in Tenafly. Chaim Book, Yosifa Book, and Stefanie Dardik Gottlieb live in Tenafly. At the time of briefing in this appeal, Stephen Brenner was not a Tenafly resident, but was building a house in Tenafly and planned to move there once it was completed. For simplicity, we refer to TEAI and the individual plaintiffs collectively as "the plaintiffs" throughout this opinion.

objects outside their homes on the Sabbath or Yom Kippur.[4] In accordance with a religious convention practiced by Orthodox Jews for over two thousand years, however, the plaintiffs believe they may engage in such activities outside their homes on the Sabbath within an *eruv*, a ceremonial demarcation of an area. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 155 F. Supp. 2d 142, 146 (D.N.J. 2001). An *eruv* extends the space within which pushing and carrying is permitted on the Sabbath beyond the boundaries of the home, thereby enabling, for example, the plaintiffs to push baby strollers and wheelchairs, and carry canes and walkers, when traveling between home and synagogue. Without an *eruv* Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath.

Centuries ago, an *eruv* would be built using ropes and wooden poles. Today, Orthodox Jews can construct an *eruv* by attaching *lechis*—thin black strips made of the same hard plastic material as, and nearly identical to, the coverings on ordinary ground wires—vertically along utility poles. Along with preexisting horizontal overhead utility lines, the *lechis* designate an *eruv*'s boundaries.[5] Unless one knows which black plastic strips are *lechis* and which are utility wires, it is "absolutely impossible" to distinguish the two.

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4. For simplicity, we refer throughout the remainder of our opinion only to the Sabbath.

5. Many major cities across the United States—such as Washington, D.C., New York, Chicago, Philadelphia, Los Angeles, Baltimore, Atlanta, and Cincinnati—have one or more *eruvs*. Both the White House and the United States Supreme Court are within the boundaries of an *eruv*.

Id. at 149. Throughout this litigation, the plaintiffs have maintained that an *eruv* (as well as each constituent *lechi*) is "not a religious symbol," but rather is an item with "religious significance." *Id.* at 148.

On June 1, 1999, Erez Gotlieb and Gary Osen, two Orthodox Jews who are not parties to this case, met with Tenafly Mayor Ann Moscovitz to discuss creating an *eruv* in the Borough. Gotlieb and Osen met with Moscovitz because under Orthodox Jewish law an *eruv* is not valid unless a civil official with jurisdiction over the circumscribed area issues a ceremonial proclamation "renting" the area for a nominal fee (*e.g.*, one dollar). The Mayor said she lacked authority to issue the requested proclamation, but agreed to bring the matter to the attention of the Borough Council, the Borough's legislative branch.[6] She did not mention Ordinance 691 or suggest that affixing *lechis* to utility poles might violate any other ordinance.

At the next Council meeting, on July 8, 1999, the Council and approximately thirty Tenafly residents debated whether the Borough should grant the proclamation. Many of those present expressed vehement objections prompted by their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly. A Council member whom the District Court was unable to identify noted "a concern that the Orthodoxy would take over" Tenafly. *Id.* at 151-52. One Council member voiced his "serious concern" that "Ultra-Orthodox" Jews might "stone [] cars that drive down the streets on the Sabbath."

6. Six Council members compose the Borough's legislative branch. The Mayor does not participate in lawmaking unless the Council is deadlocked, in which case she casts the tie-breaking vote.

Id. at 153-54. The Borough Attorney participated in the debate. Neither he nor anyone else mentioned Ordinance 691 or indicated that attaching *lechis* to utility poles might be unlawful.

The Council decided to demand a formal, written proposal before voting on whether to issue the proclamation. Mayor Moscovitz advised Gotlieb and Osen, who did not attend the meeting, that the Council was unlikely to grant their request for a proclamation, but invited them to submit a formal application. Frustrated by the Borough's reticence, in August 1999 TEAI asked Bergen County Executive William P. Schuber, whose jurisdiction includes Tenafly, to issue the ceremonial proclamation necessary to validate the *eruv*. On December 15, 1999, he did so. The constitutionality of this action is not challenged in this case, and neither Schuber nor any other Bergen County official is a party.

Verizon, the local telephone company, owns the utility poles in Tenafly, though the poles are located on the Borough's property.[7] In April 2000, the plaintiffs asked Verizon for permission to attach *lechis* to its utility poles. The plaintiffs said in a sworn statement, which the District Court found "credible," that they did not believe any municipal ordinance prohibited them from doing so, and thus that they did not need the Council's permission. *Id.* at 155. After the plaintiffs informed Verizon about the proclamation, they say, the company's in-house counsel researched whether

7. When some of the events pertinent to this case occurred, the company now known as Verizon was named Bell Atlantic Telephone Company. 155 F. Supp. 2d at 154-55. For convenience we refer to it as Verizon throughout.

municipal approval was required and advised the plaintiffs that it was not.

In June 2000 Cablevision, holder of the local cable television franchise, volunteered to help the plaintiffs affix *lechis* to Verizon's utility poles as a community service. With the help of Cablevision personnel and equipment, an *eruv* was completed in Tenafly sometime in September 2000.[8] The plaintiffs represent, and the Borough does not disagree, that only private funds have supported the *eruv* and that no municipal assistance of any kind will be needed to maintain it.

Borough officials apparently did not learn that an *eruv* was being erected in Tenafly until late August 2000. Mayor Moscovitz and Councilman Charles Lipson met with two local Jewish leaders on September 14, 2000, to discuss the matter. One of the Jewish leaders perceived some of the Mayor's remarks as derogatory toward Orthodox Jews, and the meeting was unproductive. Twelve days later, Borough Administrator Joseph DiGiacomo, acting at the Mayor's behest, asked Cablevision why it helped attach the *lechis* without the Borough's permission. According to DiGiacomo, the company told him that "a Rabbi" had advised it that TEAI had the necessary government approval. *Id.* at 158. On October 10, 2000, Mayor Moscovitz and the Council directed the Borough Administrator to ask Cablevision to remove the *lechis* from the utility poles "as soon as possible." *Id.*

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8. According to the District Court, a map of Tenafly, which does not appear in the appellate record, "suggests" that the *eruv* enables the plaintiffs to push and carry objects in 35-40% of the Borough. 155 F. Supp. 2d at 149.

Appendix A

On October 23, 2000, Cablevision wrote to the plaintiffs and informed them that the Borough instructed it to take down the *lechis*. Cablevision said it would begin complying with the Borough's order within three days unless the plaintiffs demonstrated they had municipal approval. Counsel for the plaintiffs subsequently negotiated from the Borough a thirty-day reprieve to give TEAI an opportunity to apply for permission from the Council to maintain the *eruv*. The letter setting out this agreement, sent by the plaintiffs' counsel to Borough Attorney Walter Lesnevich, states in part: "I also appreciate your advice that the Borough has no specific ordinance covering this matter or any particular format for the *Eruv* Association to follow in submitting its request." *Id.* at 159. By the beginning of November 2000, neither Lesnevich nor any other Borough official had raised the possibility that Ordinance 691 or another ordinance might be relevant to the dispute over the *lechis*.

On November 7, 2000, the plaintiffs filed their application with the Borough, asking the Council not to remove or order the removal of the *lechis*. On November 21, 2000, the Council decided to hold two hearings to allow members of the public to comment on the plaintiffs' proposal. The Council scheduled the first hearing for November 28, 2000, and the second for December 12, 2000. Fifty-four members of the public, including plaintiff Chaim Book and other *eruv* proponents, spoke at the two hearings. The speakers were evenly divided between supporters and opponents of the *eruv*. During the hearings, Council members did not express their views until the conclusion of the December 12 hearing. At that hearing, just before the Council voted on the plaintiffs' application, one Councilman stated

that "[t]o the best of my knowledge," the Borough had "no ordinance, no resolution that says that you cannot hang something from a utility pole." Mayor Moscovitz responded by saying "[t]here is an ordinance," and Lesnevich then described Ordinance 691. This exchange was apparently the first time that Borough officials mentioned Ordinance 691 with regard to the *lechis*.

Shortly after Lesnevich brought Ordinance 691 to the Council members' attention, the Council voted 5-0 to force the plaintiffs to remove the *lechis*.[9] The next day, the Borough ordered Cablevision to take the *lechis* off the utility poles "as soon as possible." 155 F. Supp. 2d at 163. The plaintiffs responded by suing in the District Court on December 15, 2000, alleging violations of the First and Fourteenth Amendments, 42 U.S.C. §§ 1983 and 1985, and the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a), and seeking an injunction barring the Borough from interfering with the *eruv*.[10]

Pursuant to Federal Rule of Civil Procedure 65(b), the District Court issued a temporary restraining order precluding the Borough from disturbing the *eruv*. Consent orders extended the duration of the restraint until the Court ruled on the plaintiffs' request for a preliminary injunction. After the parties completed limited discovery, the Court held an evidentiary hearing that spanned four days, received

9. One Council member was not present and thus did not vote.

10. The plaintiffs did not allege an Equal Protection Clause violation. In addition, though not relevant to this appeal, the plaintiffs sought compensatory damages and attorneys' fees.

additional affidavits, and heard oral arguments. On August 10, 2001, the Court issued an opinion denying the plaintiffs' request for injunctive relief on the ground that they are not reasonably likely to succeed on the merits of any of their claims.

The District Court's discussion began with the plaintiffs' claim that the Borough violated the First Amendment's Free Speech Clause. The Court concluded (albeit without citing our decision in *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086 (3d Cir. 1995)) that the act of affixing *lechis* to utility poles is "symbolic speech." 155 F. Supp. 2d at 173. Next the Court determined that the Borough's utility poles are a nonpublic forum, and that the Borough did not discriminate against the plaintiffs' religious viewpoint when it ordered the *lechis* removed. *Id.* at 174-80. The Court acknowledged that the Borough had expressly or tacitly permitted various facial violations of Ordinance 691,[11] such as the holiday displays and church directional signs. But it distinguished the *lechis*, reasoning that the other materials affixed to the utility poles served commercial or functional purposes, were not religious in nature, and were not intended to be attached permanently. *Id.* at 176-78. Other items frequently affixed to utility poles in violation of Ordinance 691, such as the lost animal signs and permanently attached house numbers, did not show discriminatory

11. The Borough submitted a copy of a separate ordinance that prohibits posting signs on utility poles. The Borough has not suggested, either to the District Court or to our Court, that its decision to remove the *lechis* was based on that ordinance. Instead, it has maintained throughout this litigation that its decision was based only on Ordinance 691. *See, e.g.*, 155 F. Supp. 2d at 159-60.

enforcement because the Borough said it made efforts to remove some of them after the plaintiffs sued. *Id.* at 177-78. As for the orange ribbons, the Court stated that, notwithstanding Mayor Moscovitz's testimony and other evidence in the record, it "lack[ed] sufficient information" to find that the Borough knew about and tacitly approved them. *Id.* at 177. The Court concluded that the Borough's application of the ordinance did not discriminate against the plaintiffs' religious viewpoint, and thus their free speech claim could not succeed. *Id.* at 180.

The District Court also rejected the plaintiffs' claim that the Borough violated the First Amendment's Free Exercise Clause. *Id.* at 180-86. The Court disagreed with the plaintiffs' position that the objective effect of the Borough's decision was to discriminate against religiously motivated activity. It noted that, under *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), the Borough can deny access to utility poles on its land for a religion-neutral reason even if doing so imposes an "incidental" burden on Orthodox Jews' ability to practice their religion. 155 F. Supp. 2d at 180-81. The Court reasoned that because the Borough ordered the *lechis* taken down pursuant to Ordinance 691, "a pre-existing, neutral law of general applicability," the issue was controlled by the Supreme Court's ruling in *Employment Division v. Smith,* 494 U.S. 872 (1990), rather than by its subsequent decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). 155 F. Supp. 2d at 181. The Court did not consider whether its earlier conclusion that Borough officials chose not to enforce Ordinance 691 with respect to some secularly motivated commercial and functional postings, *see id.* at 177-80,

affected the free exercise analysis. Under *Smith*, the District Court reasoned, the Borough Council's decision to enforce Ordinance 691 against the *eruv* had an objectively neutral effect that did not implicate the Free Exercise Clause. *Id.*

The Court thought, however, that the Council members' improper subjective motivations nonetheless necessitated strict scrutiny under *Lukumi*. *Id.* at 183. It found that, while the Council members had no religious animosity, they acted because of the "constitutionally impermissible" fear that the *eruv* would facilitate the formation of an insular Orthodox Jewish "community within a community" in Tenafly. *Id.* at 182-83. Nevertheless, no Free Exercise Clause violation occurred because the Council members' decision was "narrowly tailored to further their interest in avoiding the *appearance* of an Establishment Clause concern." *Id.* at 184 n.26 (emphasis added).

Finally, the Court held that the plaintiffs lack standing to sue under the FHA because the Borough did not "make unavailable or deny" housing within the meaning of the relevant provision, 42 U.S.C. § 3604(a). *Id.* at 186-90. Every case finding a violation of § 3604(a), the District Court noted, involved conduct that "directly affected the availability of housing," whereas the plaintiffs seek a "non-housing use of municipal property." *Id.* at 187.

The Court concluded that, because the plaintiffs were not reasonably likely to succeed on any of their claims, injunctive relief was not appropriate. The plaintiffs timely appealed, giving us jurisdiction pursuant to 28 U.S.C.

§ 1292(a)(1),[12] and we granted their request for an injunction prohibiting removal of the *lechis* pending our decision. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, No. 01-3301 (3d Cir. Sept. 19, 2001) (order).

II. Standard of Review

We review the District Court's ultimate decision to deny a preliminary injunction for abuse of discretion. See *Dam Things from Denmark, a/k/a Troll Co. ApS, v. Russ Berrie & Co.*, 290 F.3d 548, 556 (3d Cir. 2002); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Virgin Islands*, 218 F.3d 232, 235 (3d Cir. 2000). But "'any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination.'" *Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148, 150-51 (3d Cir. 2001) (quoting *Am. Tel. & Tel. Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). Thus "we exercise plenary review over the District Court's conclusions of law and its application of the law to the facts." *Id.* at 151 (quoting *Duraco Prods., Inc. v. Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1438 (3d Cir. 1994)).

Ordinarily we will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error. *See* Fed. R. Civ. P. 52(a); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002); *S. Camden Citizens in Action v. N.J. Dep't of Envtl.*

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12. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Protection, 274 F.3d 771, 777 (3d Cir. 2001). This case, however, involves First Amendment claims, and "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 567 (1995). Therefore, we have "a constitutional duty to conduct an independent examination of the record as a whole," and we cannot defer to the District Court's factual findings unless they concern witnesses' credibility. *Id.*; *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 510-11 (1984); *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.,* 148 F.3d 242, 247 (3d Cir. 1998). Accordingly, we examine independently the facts in the record and "draw our own inferences" from them. *Christ's Bride,* 148 F.3d at 247.

III. Discussion

Four factors governed the District Court's decision whether to issue a preliminary injunction barring the Borough from removing the *eruv*. To obtain an injunction, the plaintiffs had to demonstrate (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief. *See S. Camden Citizens,* 274 F.3d at 777; *Adams v. Freedom Forge Corp.,* 204 F.3d 475, 484 (3d Cir. 2000). If these two threshold showings are made the District Court then considers, to the extent relevant, (3) whether an injunction would harm the Borough more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest. *See S. Camden Citizens,* 274 F.3d at 777; *Freedom Forge,* 204 F.3d at 484. Because the District Court ended its

analysis after concluding that the plaintiffs did not show that their claims are reasonably likely to succeed, *see* 155 F. Supp. 2d at 171, 191, our discussion focuses on that factor. Disposing of the plaintiffs' FHA claim in the margin,[13] we

13. We can dispense quickly with the plaintiffs' contention that they have a valid FHA claim. One necessary element of a cause of action under the FHA is that the plaintiffs must be "aggrieved person[s]," 42 U.S.C. § 3613(a)(1)(A), which in this context means victims of "a discriminatory housing practice," *id.* § 3602, that "make[s] unavailable or den[ies]" housing to them based on their religion. *Id.* § 3604(a). Some of the plaintiffs lived in the Borough before the *eruv* was established. 155 F. Supp. 2d at 188. Therefore, while the plaintiffs claim that the Borough wants to remove the *eruv* to discourage Orthodox Jews from moving into town, they do not claim that removing the *eruv* would make housing within the Borough "unavailable" to them. Instead, they argue that removing the *eruv* would make their living in the Borough much less desirable. But they concede that the Borough's decision did not directly affect anyone's current or future home. To our knowledge, no court has stretched the "make unavailable or deny" language of § 3604(a) to encompass actions that both (1) do not actually make it more *difficult* (as opposed to less *desirable*) to obtain housing *and* (2) do not directly regulate or zone housing or activities within the home. *See, e.g., LeBlanc-Sternberg v. Fletcher,* 67 F.3d 412, 424 (2d Cir.1995) (stating that the pertinent language "has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions"); *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors,* 935 F.2d 868, 882 (7th Cir.1991) (stating that the relevant language of § 3604(a) applies to "actions by individuals or governmental units which directly affect the availability of housing") (internal quotation marks omitted). We believe that expanding § 3604(a) as the plaintiffs suggest is unwarranted, as it would "create an FHA claim in every circumstance where a religious group is denied a request to use

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will first consider the plaintiffs' free speech claim and then discuss their free exercise claim.[14]

A. The Free Speech Claim

The First Amendment's Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of

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municipal property to make an area more appealing for the private practice of their religion," even if the municipal action has nothing to do with housing. 155 F. Supp. 2d at 189.

We note, however, that we do not agree with the Borough's contention—and the District Court's acquiescence, if its use of the word "standing" was meant to signify a perceived lack of subject-matter jurisdiction over the plaintiffs' FHA claim—that the issue is jurisdictional. When the presence or absence of a cause of action depends on how statutory language is interpreted (as the plaintiffs' FHA claim does), the absence of a valid statutory cause of action does not preclude jurisdiction unless the claim is frivolous or a transparent attempt to manufacture federal-court jurisdiction where none existed. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 122 S.Ct. 1753, 1758-59 (2002); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682-85 (1946). Because the plaintiffs' FHA claim is neither, we have jurisdiction to consider it. *See Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1280-84 (3d Cir.1993) (holding that district court's determination that defendant did not "make unavailable or deny" housing under § 3604(f) was "a judgment on the merits rather than a jurisdictional decision" because the plaintiff's claim, though ultimately unsuccessful, was not frivolous).

14. Citing *Ebler v. City of Newark*, 256 A.2d 44 (N.J. 1969), the plaintiffs attempt to raise a claim under New Jersey law. Presumably because the plaintiffs did not include this claim in their complaint, the District Court did not discuss it. We shall do likewise.

speech." U.S. Const. amend. I. "Speech" is not construed literally, or even limited to the use of words. Constitutional protection is afforded not only to speaking and writing, but also to some nonverbal acts of communication, *viz.*, "expressive conduct" (or "symbolic speech"). Affixing *lechis* to utility poles does not involve the use of words, so the plaintiffs' behavior is protected by the Free Speech Clause only if it constitutes expressive conduct.[15]

Conduct is protected by the First Amendment when "the nature of [the] activity, combined with the factual context and environment in which it was undertaken," shows that the "activity was sufficiently imbued with elements of communication to fall within the [First Amendment's]

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15. The Borough failed to contend in its brief that the act of affixing *lechis* to utility poles is not "speech" within the meaning of the First Amendment. Ordinarily we avoid addressing issues not raised in a party's opening brief. *See, e.g.*, *Kirschbaum v. WRGSB Associates*, 243 F.3d 145, 151 n.1 (3d Cir. 2001). However, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Thus we "may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before [us], even an issue the parties fail to identify and brief." *United Nat'l Bank v. Indep. Ins. Agents*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)) (omission in original). Whether the Free Speech Clause applies is a threshold question necessary to a proper analysis of the parties' arguments. Therefore, we requested that the parties provide supplemental memoranda on the issue, at which time the Borough initiated its argument that no protected expression is involved here.

scope." *Spence v. Washington,* 418 U.S. 405, 409-10 (1974); *Troster v. Pa. State Dep't of Corrections,* 65 F.3d 1086, 1090 (3d Cir. 1995). Context is crucial to evaluating an expressive conduct claim because "the context may give meaning to the symbol" or act in question. *Spence,* 418 U.S. at 410.

Until 1995, the Supreme Court determined whether speech is "sufficiently imbued with elements of communication" by asking "whether '[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson,* 491 U.S. 397, 404 (1989) (quoting *Spence,* 418 U.S. at 410-11). Applying this two-prong test (the "*Spence-Johnson* test"), the Supreme Court held that the First Amendment shelters certain forms of nonverbal communication. For instance, *Johnson* held that burning an American flag as part of a demonstration against the Reagan Administration's policies that coincided with the 1984 Republican Party convention was "speech" because its "expressive, overtly political nature" was "both intentional and overwhelmingly apparent" to the protestors' audience. 491 U.S. at 399, 406. Similarly, *Spence* held that attaching a peace symbol to an American flag and displaying the "peace flag" upside down was protected expression. The actor "testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest," and "it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." 418 U.S. at 408, 410. Additional types of nonverbal communication have also been deemed constitutionally

protected. *See, e.g., Schacht v. United States,* 398 U.S. 58, 62-63 (1970) (wearing United States military uniforms as part of theatrical presentation opposing Vietnam War); *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 505-06 (1969) (wearing black armband at school to protest Vietnam War); *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 632 (1943) (saluting the American flag to show allegiance to the United States); *Stromberg v. California,* 283 U.S. 359, 369 (1931) (displaying red flag to express opposition to organized government). In other cases, the Court assumed, without deciding, that the nonverbal political demonstrations at issue implicated the First Amendment. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984) (sleeping in a public park in front of the White House and on the Washington Mall, in the middle of winter, to protest homelessness); *United States v. O'Brien,* 391 U.S. 367, 376 (1968) (burning Selective Service registration certificate on courthouse steps to protest war).[16]

16. Some Justices have viewed other examples of nonverbal political protest as sufficiently communicative to receive First Amendment protection. *See Brown v. Louisiana,* 383 U.S. 131, 142 (1966) (plurality opinion) (finding that black citizens who silently assembled in public library to protest segregated public facilities engaged in expressive conduct); *Garner v. Louisiana,* 368 U.S. 157, 201 (1961) (Harlan, J., concurring in the judgment) (concluding that black persons who sat at "white" lunch counters to protest segregated dining facilities were engaging in symbolic speech and that their disturbing-the-peace convictions, which the majority reversed on insufficient evidence grounds, violated the First Amendment). In addition, the Supreme Court recently recognized a symbolic speech claim in a different context. *See City of Erie v. Pap's A.M.,* 529 U.S. 277, 289 (2000) (plurality opinion) (stating summarily that nude erotic dancing is "expressive conduct," though "it falls only within the outer ambit of the First Amendment's protection").

Appendix A

The Supreme Court's unanimous 1995 opinion, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), modified somewhat the test for determining when conduct constitutes "speech." In *Hurley*, a group of gays, lesbians, and bisexuals of Irish ancestry sued under a state public accommodations law barring discrimination on the basis of sexual orientation in an attempt to gain admission to a private St. Patrick's Day parade in which an array of disparate groups participated. While the parade organizers asserted their First Amendment right to shape the content of their speech, the plaintiffs maintained that the organizers had no First Amendment interest because their lack of selectivity in accepting participants made it impossible for spectators to discern a specific message. Rejecting the plaintiffs' contention, the Supreme Court explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollak, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[17] *Id.* at 569 (quoting *Spence,* 418 U.S. at 411).

By establishing that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech," *Hurley* eliminated the "particularized message" aspect of the

17. The *Hurley* Court proceeded to hold that applying the public accommodations law to force the parade organizers to include the plaintiffs violated the organizers' First Amendment right to select the components of their message. *Id.* at 579.

Spence-Johnson test. *Id.* at 569-70. The *Hurley* Court had no need to formulate a new test, however, because—unlike conduct that is not normally communicative—parades are inherently expressive. *Id.* at 568 ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."). Thus *Hurley* left open how courts should evaluate symbolic speech claims.

Before *Hurley*, we treated the *Spence-Johnson* factors as prerequisites for conduct to be deemed expressive. *See Steirer by Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 995, 997 (3d Cir. 1993) (holding that participating in community service is not expressive conduct). But after *Hurley*, our decision in *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086 (3d Cir. 1995), concluded that *Spence* (and, implicitly, *Johnson* as well) set signposts rather than requirements, and that its two factors can no longer be viewed as the only criteria. *See id.* at 1090 & n.1. Because *Spence* "contained no language of necessity," we adopted the following standard: conduct is expressive if, "considering 'the nature of [the] activity, combined with the factual context and environment in which it was undertaken,' we are led to the conclusion that the 'activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"[18] *Id.* at 1090

18. Outside our Circuit, courts continue to view the *Spence-Johnson* test as the governing standard for determining whether conduct constitutes protected expression. *See, e.g.*, *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 211 (1st Cir. 2002); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 283 (5th Cir. (Cont'd)

(quoting *Spence*, 418 U.S. at 409-10) (alteration in original). We emphasized that this "is a fact-sensitive, context-dependent inquiry," and that the putative speaker bears the burden of proving that his or her conduct is expressive. *Id.*

We then applied this formulation to reject a state corrections officer's claim that a regulation mandating that each corrections officer wear an American flag patch on his uniform's right shirt-sleeve, with the star field facing his rear, violated the First Amendment by compelling him to engage in expressive conduct. *Id.* at 1088. The officer believed that compulsory display debases the flag and that "displaying the flag with its star field to the rear signifies cowardice and retreat from the principles for which the flag stands." *Id.* Though we recognized the strength of the officer's convictions, we determined that he did not show that the act of wearing a flag patch was sufficiently communicative to receive First Amendment protection, as he did not present

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2001); *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999); *Colacurcio v. City of Kent*, 163 F.3d 545, 549 n.1 (9th Cir. 1998); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n.4 (8th Cir.1997); *United States v. Lewis*, 2002 WL 31055185, *8 (S.D. W. Va. Sept. 11, 2002); *Daly v. Harris*, 215 F. Supp. 2d 1098, 1108 (D.Haw.2002); *Isaacs ex rel. Isaacs v. Bd. of Educ.*, 40 F. Supp. 2d 335, 336 (D.Md.1999); *Al-Almin v. City of New York*, 979 F. Supp. 168, 172 (E.D.N.Y. 1997); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995); *Gallo v. County of Sonoma*, 120 Cal.Rptr.2d 550, 569 (Cal Ct. App. 2002), *State v. Machholz*, 574 N.W.2d 415, 419-20 (Minn. 1998); *Binkowski v. State*, 731 A.2d 64, 70 (N.J. Super. Ct. App. Div. 1999); *State v. Janssen*, 580 N.W.2d 260, 266 n.11 (Wis. 1998); *State v. Berrill*, 474 S.E.2d 508, 516 (W. Va. 1996).

"evidence to support his otherwise bare assertion that the flag patch regulation compels expressive conduct." *Id.* at 1091 n.4.

Our discussion in *Troster* focused on two inquiries. First, we examined whether the officer intended subjectively (*i.e.*, actually intended) for his conduct to communicate to persons whom he expected to observe it (*i.e.*, his intended audience). We determined that there was no proof that his conduct was "demonstrative of an attitude or belief" or that he "actually assert[ed] anything to anyone." *Id.* at 1091-92. Second, we considered whether observers understood the message the officer intended his conduct to convey. The record contained no evidence that "observers would likely understand the patch or the wearer to be *telling* them anything about the wearers' beliefs" or "that the flag patch on the correctional officers' uniform will relay any *message* (ideological or otherwise) to anyone." *Id.* at 1091-92 (emphases in original). Therefore, the officer's compelled speech claim failed because he did not show that the conduct in which he was forced to engage was expressive.

Our emphasis in *Troster* on the putative speaker's burden of proving that his conduct is "sufficiently imbued with elements of communication" is important to our resolution of the plaintiffs' expressive conduct claim in this case. If the putative speaker's burden were "limited to 'the advancement of a plausible contention' that [his or her] conduct is expressive"—a view espoused by a plurality of the D.C. Circuit but rejected by the Supreme Court in *Clark*—the result "would be to create a rule that all conduct is presumptively expressive." *Clark*, 468 U.S. at 293 n.5. Such

a rule would be inconsistent with the Supreme Court's repeated admonition that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech.'" *O'Brien*, 391 U.S. at 376; *see also Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 409. Therefore, as we stressed in *Troster*, 65 F.3d at 1091-92, and as the Supreme Court held in *Clark*, "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark*, 468 U.S. at 293 n.5.

With this background as context, we conclude that the plaintiffs have not met their burden of showing that affixing *lechis* to utility poles is "sufficiently imbued with elements of communication" to be deemed expressive conduct. The record indicates that the *lechis* were attached for the benefit of other Orthodox Jews, not the general public. Therefore, if the plaintiffs' conduct is expressive, their intended audience is other Orthodox Jews. But the plaintiffs have not introduced evidence that the *lechis* are meant to demonstrate a belief or assert anything to Orthodox Jews or that Orthodox Jews "likely understand" the *eruv* "to be *telling* them anything," *i.e.*, that they discern "any *message* (ideological or otherwise)" from the *lechis*.[19] *Troster*, 65 F.3d at 1091 (emphases in original). Instead, on the record before us, it appears that the *eruv* serves a purely functional, non-communicative purpose indistinguishable, for free speech purposes, from that of a fence surrounding a yard or a wall surrounding a building.

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19. As we stated above, *see supra* note 15, it appears that until we requested briefing on the issue the parties merely assumed that the *lechis* are protected by the First Amendment.

Appendix A

Rather than "actually assert[ing] anything to anyone," *id.* at 1092, it seems that the *eruv* simply demarcates the space within which certain activities otherwise forbidden on the Sabbath are allowed. Plaintiff Chaim Book described the *eruv* as a "boundary" that "requires physical demarcation," a function historically achieved by "rop[ing] an area off." Similarly, at oral argument counsel for the plaintiffs told us that the *lechis* "replace[ ] the pole[s] that would be used prior to the time there were telephone poles" to designate the *eruv*'s boundaries. While the plaintiffs describe the *eruv* in functional terms, explaining that it establishes an area within which Orthodox Jews may engage in certain otherwise impermissible activities, they offer no evidence that it communicates anything. The only evidence the plaintiffs introduced with respect to the religious significance of the *eruv* was the affidavit of Rabbi Hershel Schachter of Yeshiva University, an expert on Orthodox Jewish law. Rabbi Schachter explained that the *eruv* enables couples with young children and persons who use wheelchairs to attend synagogue on the Sabbath. He did not, however, suggest that the Orthodox Jews who affix *lechis* intend to send any message thereby, or that the *eruv* conveys any message to Orthodox Jews.

Further, there is no evidence that Orthodox Jews receive a message or ascertain the *eruv*'s boundaries by looking at the *lechis*. To the contrary, Rabbi Howard Jachter, speaking on behalf of the TEAI, said that "most Orthodox Jews do not . . . would not know how to make an *eruv*, wouldn't see where the *eruv* is, how it is. A rabbi wouldn't know how it is." Even plaintiff Chaim Book, who is obviously familiar with the *eruv*'s boundaries and the *lechis*' locations, said,

"I, who know some of the poles have *lechis*, have a hard time recognizing the *lechi* on the pole by just looking at it." In addition, plaintiffs' complaint states that "the *eruv* is not a religious symbol." Thus there is no evidence contradicting the Borough's assertion at oral argument—which the plaintiffs did not dispute—that Orthodox Jews learn the *eruv*'s boundaries by word of mouth from the persons charged with erecting and inspecting it.

Even if the plaintiffs had introduced evidence that the *lechis* serve a boundary function, that would be insufficient to prove they are "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Troster,* 65 F.3d at 1090 (internal quotation marks omitted). All boundary lines delineate the realms within which certain activities are or are not allowed. For instance, the invisible boundary between Nevada and Utah separates an area where gambling is legal from one where it is not. A homeowner's fence demarcates where his neighbor's garden must stop. The walls of a synagogue delineate the space where congregational worship takes place. But geographical boundary lines, fences, and walls are simply not protected expression in the absence of evidence that some "attitude or belief," *Troster,* 65 F.3d at 1091, is conveyed or received from them. *Cf. Dallas v. Stanglin,* 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); *Pro v. Donatucci,* 81 F.3d 1283, 1293 (3d Cir. 1996) (Roth, J., dissenting) (noting that "expression and communication

are the crucial attributes of speech," that "[n]owhere is this stress on expression and communication more clear than in the Court's approach to speech that falls outside the traditional domain of the spoken or written word," and that "[t]he classic examples of conduct-as-speech all contain patently expressive messages."). Otherwise, the act of constructing houses of worship would implicate the Free Speech Clause, whereas courts consistently analyze the constitutionality of zoning regulations limiting such construction under the Free Exercise Clause, not the Free Speech Clause. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 534 (1997); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 823-26 (10th Cir. 1988); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 307-08 (6th Cir. 1983); *Church of Jesus Christ of Latter-Day Saints v. Jefferson County,* 741 F. Supp. 1522, 1527-34 (N.D. Ala. 1990); *cf. Congregation Kol Ami v. Abington Township,* 2002 WL 31312280 (3d Cir. Oct. 16, 2002). Moreover, if solely the act of erecting a wall separating the interior of a building from the secular world constituted "speech," every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could raise a "hybrid" rights claim triggering strict scrutiny, *see Employment Division v. Smith,* 494 U.S. 872, 881-82 (1990),[20] a notion so astonishing

20. As explained in more detail below, *Smith* held that the Free Exercise Clause offers no protection when a neutral, generally applicable law incidentally burdens religious practice, with a possible exception for "hybrid" rights situations in which both the right to free exercise of religion and another constitutional right are implicated. 494 U.S. at 879, 881-82. If the law imposing the burden (Cont'd)

that we are unaware of any court—or even any law review article—that has suggested it.

Plaintiffs maintain that, although the *eruv* is functional, it is also expressive, just as the 18-foot Chanukah menorah in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), was expressive even though the functional purpose of menorahs is to hold candles. To the extent that the plaintiffs' point is that functionality and expression are "not mutually exclusive," we do not disagree; things ordinarily used for functional purposes can be used for communicative purposes as well. *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (concluding that Internet domain names are ordinarily functional, but can be expressive if they contain a message, *e.g.*, ".jones_for_ president"). But there is no evidence that the *eruv* is an example of such overlapping purposes, whereas there was ample evidence to that effect in *Allegheny*. As part of a holiday display that stood at the entrance to a government building and included a 45-foot Christmas tree, the 18-foot menorah was both intended and understood to express "a recognition that Christmas is not the only traditional way of observing the winter-holiday season" and "an acknowledgment of Chanukah as a contemporaneous alternative tradition." *Allegheny*, 492 U.S. at 617-18.

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on religious freedom is either not neutral or not generally applicable, however, it violates the First Amendment unless it satisfies strict scrutiny (*i.e.*, unless it is narrowly tailored to advance a compelling government interest). *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

In sharp contrast here, there is no evidence that Orthodox Jews intend or understand the *eruv* to communicate any idea or message. Rather, the evidence shows that the *eruv*—like a fence around a house or the walls forming a synagogue—serves the purely functional purpose of delineating an area within which certain activities are permitted.

We also reject the plaintiffs' contention that the *eruv* may be deemed expressive simply because some residents of Tenafly who are not Orthodox Jews discern various *unintended* messages emanating from it, notwithstanding that these persons would not be intended recipients even if the *lechis* were meant to send a message. To accept this position would mean that whether conduct is expressive depends entirely on how observers *perceive* it—even if the actor had no communicative intent, and even if the actor disapproves of the message (or messages) discerned by the observers. *See Troster,* 65 F.3d at 1092 (noting the difference between an observer's independent inference from an actor's behavior and an observer's receipt of a nonverbal message intentionally sent by the actor); Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 Wis. L.Rev. 1525, 1553, 1561-62 (stating that nonverbal conduct is expressive only if it involves "a conscious transfer of information," *i.e.*, "an attempt to communicate" by the actor).

Finally, we cannot accept the plaintiffs' argument that, by analogy to the protection afforded newsracks, the *eruv* is protected under the First Amendment. Relying on *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), the plaintiffs insist that, just as newsracks facilitate the

distribution of newspapers, the *eruv* facilitates religious worship.[21] But *City of Lakewood* did not treat newsracks as protected based on the sweeping rationale that they facilitate speech, but rather because they are inextricably intertwined with speech. *Id.* at 768 ("The actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected."). Unlike a newsrack, which facilitates the paradigm of communication (the sale of newspapers), there is no evidence that the *eruv* is inextricably linked to a communicative activity. Instead, the record shows that the *eruv* exists solely to designate the boundaries within which Orthodox Jews can engage in certain activities on the Sabbath. Therefore, *City of Lakewood* does not support the plaintiffs' position that the non-communicative act of delineating an area constitutes protected expression.

In sum, as in *Troster*, the plaintiffs offer nothing more than a "bare assertion" that their conduct is expressive.[22] 65 F.3d at 1091 n.4. Because this does not satisfy the plaintiffs' burden of proof, their free speech claim fails.[23]

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21. *City of Lakewood*, the Supreme Court sustained a facial challenge to an ordinance granting the mayor "unfettered discretion" to grant or deny permits to place newsracks on public property. 486 U.S. at 772.

22. Our holding is limited to the record in this case and does not necessarily preclude the possibility that a party in another case might introduce evidence showing that attaching *lechis* to utility poles is conduct protected by the Free Speech Clause.

23. Accordingly, the plaintiffs cannot assert a "hybrid rights" claim under the Free Exercise Clause. *See infra* note 26.

B. The Free Exercise Claim

1. Determining the appropriate level of scrutiny

The Free Exercise Clause, which binds the Borough pursuant to the Fourteenth Amendment, *see Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review.[24]

If a law is "neutral" and "generally applicable," and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection. *Employment Div. v. Smith,* 494 U.S. 872, 879 (1990).[25] *Smith* held that the Free Exercise Clause did not require a state to exempt the ingestion of peyote during a Native American Church ceremony from its neutral, generally applicable prohibition on using that drug. *Id.* at 882. On the other hand, if the law is not neutral (*i.e.*, if

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24. To survive strict scrutiny, a challenged government action must be narrowly tailored to advance a compelling government interest, whereas rational basis review requires merely that the action be rationally related to a legitimate government objective. As explained below, an intermediate level of scrutiny may apply in the public employment context.

25. *Smith* involved a criminal law, but its rule also applies in the context of non-criminal laws and regulations. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993); *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 363-64 (3d Cir. 1999).

it discriminates against religiously motivated conduct) or is not generally applicable (*i.e.*, if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.[26] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532, 542 (1993).

Further, the Free Exercise Clause's mandate of neutrality toward religion prohibits government from "deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999). Accordingly, in situations where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct. *See Lukumi,* 508 U.S. at 537; *Smith*, 494 U.S. at 884; *Bowen v. Roy,* 476 U.S. 693, 708 (1986) (plurality opinion); *Fraternal Order of Police,* 170 F.3d at 364-65. Thus in *Lukumi* the Supreme Court invalidated an ordinance "punishing '[w]hoever . . . unnecessarily . . . kills any animal,'" where state and local

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26. Strict scrutiny may also apply when a neutral, generally applicable law incidentally burdens rights protected by "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children," *Smith,* 494 U.S. at 881 (citations omitted), but the plaintiffs do not assert such a "hybrid rights" claim.

officials interpreted the ordinance to ban animal sacrifices during Santeria religious ceremonies, but to exempt secular activities such as hunting, slaughtering animals for food, and even using live rabbits to train greyhounds. 508 U.S. at 537 (alteration in original). The officials' selective application of the ordinance "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons," causing religiously motivated conduct to be "singled out for discriminatory treatment." *Id.* at 537-38. Therefore, strict scrutiny applied, and the ordinance failed that test because its "proffered objectives [were] not pursued with respect to analogous non-religious conduct." *Id.* at 546.

Because the ordinance in *Lukumi* gave officials discretion to consider "the particular justification" for each violation, it "represent[ed] a system of 'individualized governmental assessment of the reasons for the relevant conduct,'" triggering under *Smith* strict scrutiny of the ordinance's application to religiously motivated conduct. *Id.* at 537 (quoting *Smith,* 494 U.S. at 884). In *Fraternal Order of Police*, we held that the neutrality principle applies with equal force when government creates categorical, as opposed to individualized, exceptions for secularly motivated conduct. 170 F.3d at 365. A city's police department applied its no-beard policy, which was designed to promote uniform appearance, to allow medical exemptions but deny similar exemptions to two Sunni Muslim officers whose faith required them to grow beards. *Id.* at 360-61, 366. Selective enforcement of this nature, we said, exemplified the Supreme Court's concern in *Smith* and *Lukumi* about "the prospect of the government's deciding that secular motivations are more important than religious motivations." *Id.* at 365. It showed

that the police department "made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366. Therefore, the enforcement of the policy against the Sunni Muslim officers was "sufficiently suggestive of discriminatory intent . . . to trigger heightened scrutiny under *Smith* and *Lukumi*."[27] *Id.* at 365. The Sunni Muslim officers'

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27. *Smith* and *Lukumi* state unambiguously that strict scrutiny applies when government discriminates against religiously motivated conduct. *See Smith,* 494 U.S. at 884; *Lukumi,* 508 U.S. at 546. However, our decision in *Fraternal Order of Police* applied only "heightened" or "intermediate" scrutiny, under which the challenged government action must be substantially related (rather than narrowly tailored) to promoting an important (rather than compelling) government interest. We did so because First Amendment rights are limited in the public employment context by a government's need to function efficiently. *See, e.g., United States v. Nat'l Employees Treasury Union,* 513 U.S. 454, 465 (1995); *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). In any event, we determined that the police department's discriminatory value judgment failed even intermediate scrutiny. *Fraternal Order of Police,* 170 F.3d at 365-66 & n.7.

We note that, in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions not entailing subjective, individualized consideration. *See Swanson v. Guthrie v. Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 701 (10th Cir. 1998) (stating that school district's excepting fifth-year seniors and special education students from "no-part-time-attendance" policy did not require strict scrutiny of refusal to allow Christian home-schooled student to attend part-time);

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beards posed no greater threat to uniform appearance than did the beards worn by officers with medical conditions. *Id.* at 366. Thus the police department's policy was void under "any degree of heightened scrutiny." *Id.* at 367.

Smith, *Lukumi*, and *Fraternal Order of Police* point the way to the appropriate level of scrutiny in this case. On its face, Ordinance 691 is neutral and generally applicable. But "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded [from constitutional attack] by mere compliance with the requirement of facial neutrality." *Lukumi,* 508 U.S. at 534. We must look beyond the text of the ordinance and examine whether the Borough enforces it on a religion-neutral basis, as "the effect of a law in its real operation is strong evidence of its object." *Id.* at 535.

Because Ordinance 691 is neutral and generally applicable on its face, if the Borough had enforced it uniformly, *Smith* would control and the plaintiffs' claim would accordingly fail. The Borough insists it has done so, but the record shows otherwise. Indeed, the Borough has tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious—

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Am. Friends Serv. Comm. v. Thornburgh, 951 F.2d 957, 961 (9th Cir.1991) (determining that exceptions in statute regulating immigrant hiring for independent contractors, household employees, and employees hired before November 1986 did not trigger strict scrutiny of denial of religiously motivated exemption request because the statutory exceptions "exclude entire, objectively-defined categories of employees from the scope of the statute").

though never Orthodox Jewish—purposes. *Cf. Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding that city violated Free Exercise Clause by enforcing ordinance banning meetings in park against Jehovah's Witnesses but exempting other religious groups).

From the drab house numbers and lost animal signs to the more obtrusive holiday displays, church directional signs, and orange ribbons—the last of which the District Court erroneously deemed irrelevant to the constitutional analysis[28] —the Borough has allowed private citizens to affix various materials to its utility poles. Apart from their religious nature, the *lechis* are comparable to the postings the Borough has left in place. If anything, the *lechis* are less of a problem because they are so unobtrusive; even observant Jews are often unable to distinguish them from ordinary utility wires. While the Borough alleges that the *lechis* are different because the plaintiffs intend them to be "permanent," house numbers nailed to utility poles are likewise intended to be permanent. And although the Borough insists that the *lechis*' religious nature justifies its decision to remove them, this is precisely the sort of reasoning that *Lukumi* and *Fraternal Order of Police* forbid.

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28. Pursuant to our "constitutional duty to conduct an independent examination of the record as a whole," *Hurley*, 515 U.S. at 567, we believe there is ample evidence in the record showing that orange ribbons were attached to the Borough's utility poles for "a lengthy period of time" and that Borough officials knew about them but made no effort to remove them. A594-95 (Mayor Moscovitz Test.); *see also* A277 (statement of Tenafly resident Lee Rosenbaum that "[s]urely, a town that brandished orange ribbons tied to almost every pole in town for what I think was several years can tolerate some unobtrusive markers").

We believe that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* because it "devalues" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than nonreligious reasons," and thus "single[s] out" the plaintiffs' religiously motivated conduct for discriminatory treatment. *Lukumi,* 508 U.S. at 537; *Fraternal Order of Police,* 170 F.3d at 364-65.[29] Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santeria animal sacrifice, and just as the medical exemption in *Fraternal Order of Police* indicated that the police department was discriminating against religiously motivated requests to grow beards, the Borough's invocation of the often-dormant Ordinance 691 against conduct motivated by Orthodox Jewish beliefs is "sufficiently suggestive of discriminatory intent," *Fraternal Order of Police,* 170 F.3d at 365, that we must apply strict scrutiny. *See Lukumi,* 508 U.S. at 546.[30]

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29. We note, however, that we reject the plaintiffs' contention that the Free Exercise Clause bars the Borough from distinguishing between the *lechis* and the plastic-covered wires attached to utility poles by telephone and cable television companies. Because utility poles exist to facilitate telecommunications, utility wires are obviously unlike any of the other materials the Borough has allowed people to affix to the poles.

30. Whereas First Amendment rights are necessarily limited in the public employment context, *see Nat'l Employees Treasury Union,* 513 U.S. at 465, our case, unlike *Fraternal Order of Police*, involves purely private conduct. Thus *Smith* and *Lukumi* obligate us to apply strict scrutiny. *See supra* note 27.

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The Borough nonetheless contends that three aspects of this case—the plaintiffs' use of government property, the lack of a "substantial burden" on the plaintiffs' religious freedom, and the "optional" nature of the *eruv*—place it outside the framework of *Lukumi* and *Fraternal Order of Police*, and thus preclude us from applying strict scrutiny even though the Borough has discriminated against conduct motivated by Orthodox Jewish beliefs.

First, the Borough insists that, because the utility poles are on its land, this case is governed by *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which held that the Free Exercise Clause did not prevent the federal government from implementing a decision, based on religion-neutral criteria, to construct a road and allow timber harvesting on 17,000 acres of national forest land traditionally used by Native Americans for religious practices. *Id.* at 447-53; *see also Bowen v. Roy*, 476 U.S. 693, 699-701,

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We note that, in determining the appropriate standard to apply, we do not believe it necessary to consider the subjective motivations of the Council members who voted to remove the *eruv*. *Lukumi* and *Fraternal Order of Police* inferred discriminatory purpose from the objective effects of the selective exemptions at issue without examining the responsible officials' motives. *See Lukumi*, 508 U.S. at 537-38; *Fraternal Order of Police*, 170 F.3d at 364-66; *see also Laurence H. Tribe, American Constitutional Law* § 5-16, at 956 (3d ed. 2000) ("Under *Smith*, a law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure."). Likewise, the objective effects of the Borough's enforcement of Ordinance 691 are sufficient for us to conclude that it is not being applied neutrally against the *eruv*.

708 (1986) (holding that Free Exercise Clause did not require government to grant religious exemption from generally applicable, religion-neutral statutory requirement that welfare recipients furnish their Social Security numbers where no individualized exemptions were allowed). According to the Borough, the controlling principle is that "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Northwest Indian Cemetery,* 485 U.S. at 451 (1988) (quoting *Sherbert,* 374 U.S. at 412 (Douglas, J., concurring)); *Roy,* 476 U.S. at 700.

Contrary to the Borough's position, however, the principle of *Lukumi* and *Fraternal Order of Police*—that government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting—applies not only when a coercive law or regulation prohibits religious conduct, but also when government denies religious adherents access to publicly available money or property. *See Sherbert v. Verner,* 374 U.S. 398, 404-05 (1963) (holding that Free Exercise Clause prohibits state from devaluing religious reasons for seeking unemployment benefits); *Davey v. Locke,* 299 F.3d 748, 753-54 (9th Cir. 2002) (holding that Free Exercise Clause bars state from making college scholarships contingent on recipients not majoring in theology); *cf. Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. at 831-35 (holding that Free Speech Clause precludes state university that pays student publications' printing costs from denying funding based on publication's religious viewpoint).

In contrast, the principle of *Northwest Indian Cemetery* applies only when a person of faith asks for special, not equal, treatment in the context of a religion-neutral policy. *See Adams v. Comm'r of Internal Revenue,* 170 F.3d 173, 181 & n.10 (3d Cir. 1999) (rejecting argument that "uniform and facially neutral" penalty for "a conscious, intentional failure" to file taxes could not be applied to religious objector); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 701-02 (10th Cir. 1998) (rejecting claim that school district must grant religiously motivated request for individualized exemption from no-part-time-attendance policy where no individualized exemptions were granted). It does not apply when government discriminates against religiously motivated conduct in allocating "the rights, benefits, and privileges enjoyed by other citizens." *Northwest Indian Cemetery,* 485 U.S. at 449.

In this case, the plaintiffs are not asking for preferential treatment. Instead, they ask only that the Borough not invoke an ordinance from which others are effectively exempt to deny plaintiffs access to its utility poles simply because they want to use the poles for a religious purpose. *Cf. Widmar v. Vincent,* 454 U.S. 263, 273 n.13 (1981) ("This case is different from the cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause.") (emphasis in original); *Davey,* 299 F.3d at 757-58 ("This is not a case where a person claims that denial of a financial benefit which is not available to others deprives him of his free exercise rights."). Therefore, *Lukumi* and *Fraternal Order of Police*, not *Northwest Indian Cemetery*, control our disposition.

Second, the Borough maintains that strict scrutiny should not apply because the plaintiffs have not shown that the removal of the *eruv* would substantially burden their religious practice. Under *Smith* and *Lukumi*, however, there is no substantial burden requirement when government discriminates against religious conduct. *See Lukumi*, 508 U.S. at 531-47 (finding Free Exercise Clause violation without considering whether a substantial burden on religious freedom existed); *Fraternal Order of Police*, 170 F.3d at 364-67 (same); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) ("Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment."). Instead, the plaintiffs need to show only "a sufficient interest in the case to meet the normal requirement of constitutional standing," *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (rejecting substantial burden requirement), and their inability to attend synagogue on the Sabbath without the *eruv* easily suffices.

Moreover, *Smith* admonished courts not to engage in the sort of inquiry the Borough demands. The Supreme Court explained that "[j]udging the centrality of different religious practices" violates the principle that "courts must not presume to determine the place of a particular belief in a religion." *Smith*, 494 U.S. at 887; *see also DeHart v. Horn*, 227 F.3d 47, 56 (3d Cir. 2000) (*en banc*) (same). Evaluating the extent of a burden on religious practice is equally impermissible, the *Smith* Court said, because it entails a forbidden inquiry into religious doctrine. "'Constitutionally significant burden' would seem to be 'centrality' under another name," and

"inquiry into 'severe impact' is no different from inquiry into centrality."[31] *Smith,* 494 U.S. at 887 n.4; *see also Northwest*

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31. Notwithstanding the Supreme Court's admonition in *Smith* against judicial inquiries into the centrality of religious practices, a number of circuit courts persist in imposing a substantial burden requirement in various contexts. *See, e.g., Levitan v. Ashcroft,* 281 F.3d 1313, 1320 (D.C. Cir. 2002) (stating in prison context that free exercise plaintiff must demonstrate that the challenged law burdens "a central tenet or important practice of [his] religion"); *Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1124 (9th Cir. 2002) (noting that Ninth Circuit continues to demand that a plaintiff show substantial burden in challenges to government actions that are not "regulatory, proscriptive or compulsory," though the more recent decision in *Davey v. Locke,* discussed above, did not impose this requirement); *Altman v. Minn. Dep't of Corrections,* 251 F.3d 1199, 1204 (8th Cir. 2001) ("Government significantly burdens the exercise of religion if it significantly constrains conduct or expression that manifests a central tenet of a person's religious beliefs, meaningfully curtails the ability to express adherence to a particular faith, or denies reasonable opportunities to engage in fundamental religious activities."); *Altman v. Bedford Cent. Sch. Dist.,* 245 F.3d 49, 79 (2d Cir.2001) (stating, contrary to *Smith* and *Lukumi* and without citing either opinion, that substantial burden test applies when *neutral* law incidentally impinges on religious exercise); *Strout v. Albanese,* 178 F.3d 57, 65 (1st Cir.1999) (quoting a pre-*Smith* case for the proposition that "the free exercise inquiry [is] whether government has placed a substantial burden on the observation of a *central belief or practice*") (internal quotation marks omitted) (emphasis in original); *United States v. Grant,* 117 F.3d 788, 793 (5th Cir.1997) (rejecting free exercise claim, without citing *Smith* or *Lukumi*, on ground that plaintiff's religious freedom was not substantially burdened); *Goodall by Goodall v. Stafford County Sch. Bd.,* 60 F.3d 168, 173 (4th Cir.1995) (stating that substantial burden requirement applies when challenged law is not generally

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Indian Cemetery, 485 U.S. at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."); *cf. Widmar,* 454 U.S. at 269 n.6 (rejecting distinction between "religious worship" and other religious speech because it would require courts "to inquire into the significance of words and practices to different religious faiths" and "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases").

Third, the Borough asserts that the plaintiffs cannot state a free exercise claim because the *eruv* is an "optional" religious practice. For reasons similar to those counseling against requiring the plaintiffs to demonstrate a substantial burden on their religious practice, we cannot accept the Borough's contention that courts presented with free exercise claims should, as a threshold matter, determine whether the religious practices at issue are "mandatory" or "optional." We need not consider whether the Borough's characterization of the *eruv* is accurate. Neither the Supreme Court nor our Court has intimated that only compulsory religious practices fall within the ambit of the Free Exercise Clause. To the

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applicable); *Fleischfresser v. Dirs. of Sch. Dist. 200,* 15 F.3d 680, 689-90 (7th Cir. 1994) (requiring substantial burden as prerequisite for free exercise claim without citing *Smith*); *Church of Scientology v. City of Clearwater,* 2 F.3d 1514, 1549 (11th Cir. 1993) (stating that strict scrutiny applies when a law that targets religion imposes a substantial burden on believers).

contrary, our *en banc* decision in *DeHart* said that conduct implicates the Free Exercise Clause if it is motivated by "beliefs which are both sincerely held and religious in nature" without regard to whether it is mandatory. 227 F.3d at 51; *cf. id.* at 54-55 (rejecting contention that, in the context of prisoners' free exercise claims, conduct based on "religious commandments" should receive more protection than conduct that is "a positive expression of belief"); *see also Levitan v. Ashcroft,* 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that, because "[a] requirement that a religious practice be mandatory to warrant First Amendment protection finds no warrant in the cases of the Supreme Court or of this court," Catholic prisoners could raise free exercise challenge to rule barring them from consuming small amounts of wine during Communion).[32] Further, if the Borough's position were correct, the *Lukumi* Court would have considered whether Santeria adherents believe their faith commands them to sacrifice animals. But the Court did not do so, instead deeming it sufficient that they had a sincere desire to sacrifice animals for religious reasons. *See Lukumi,* 508 U.S. at 531.

Additionally, if anything turned on whether a religious practice is "mandatory" or "optional," courts would have to question "the validity of particular litigants' interpretations of [their] creeds" and perhaps even adjudicate "controversies over religious authority or dogma," tasks that are "not within

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32. *But see Ward v. Walsh,* 1 F.3d 873, 878 (9th Cir. 1993) (suggesting, without citing supporting legal authority, that there is a "distinction between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul" in the context of prisoners' free exercise claims).

the judicial ken." *Smith,* 494 U.S. at 877, 887 (internal quotation marks omitted); *cf. Presbyterian Church in U.S. v. Mary Elizabeth Hull Mem'l Presbyterian Church,* 393 U.S. 440, 449-50 (1969) (holding that the Free Exercise Clause prohibits courts from deciding church property disputes by resolving underlying conflicts over "the interpretation of particular church doctrines and the importance of those doctrines to the religion"); *see also United States v. Ballard,* 322 U.S. 78, 84-88 (1944) (holding that courts can inquire into the sincerity, but not the truth or falsity, of religious beliefs).

Finally, if the First Amendment shielded only compulsory religious practices, religions without commandments "would find themselves outside the scope of First Amendment protection altogether," *Levitan,* 281 F.3d at 1320, a result antithetical to basic Free Exercise Clause norms. *See, e.g., Fowler,* 345 U.S. at 70 ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."). As the Borough's arguments for eschewing strict scrutiny are unpersuasive, we must consider whether its invocation of Ordinance 691 against the *lechis* is likely to pass that test.

2. Application of strict scrutiny

Because the Borough's decision to remove the *eruv* is not neutral toward conduct motivated by Orthodox Jewish beliefs, it "must undergo the most rigorous of scrutiny." *Lukumi,* 508 U.S. at 546. To be permissible under the Free Exercise Clause, it "must advance interests of the highest order and must be narrowly tailored in pursuit of those

interests." *Id.* (internal quotation marks omitted). The Borough attempts to justify its decision to remove the *eruv*, and distinguish the *lechis* from the violations of Ordinance 691 it has tolerated, on the grounds that the *lechis* are "permanent" and religious in nature. Neither ground is persuasive.

Much of our strict scrutiny analysis parallels our earlier discussion of why the Borough's decision is not religion-neutral. *See Lukumi,* 508 U.S. at 546-47 (stating that lack of neutrality eviscerates contention that restriction is narrowly tailored to advance compelling interest). First, for many years—and, the record shows, after the plaintiffs sued—the Borough has allowed its residents to nail house numbers to utility poles. Because the Borough has tolerated equally permanent house numbers, it hardly has a compelling interest in refusing to allow the inconspicuous *lechis* on the ground that they are permanent. Further, it is hard to see how the allegedly permanent nature of the unobtrusive *lechis* somehow undermines Ordinance 691's objective of avoiding visual clutter and maintaining control over municipal property more than items like bright orange ribbons and lost animal signs. Moreover, even if the Borough had a compelling interest in preventing permanent fixtures on its utility poles, its decision to remove the *eruv* while allowing the house numbers is not narrowly tailored to promote that interest.

Though the Borough's claim that it can remove the *eruv* because of its religious nature requires more discussion, it is similarly unpersuasive. The Borough maintains that its decision to remove the *eruv* is justified by its "compelling"

interest in avoiding "an Establishment Clause controversy." Contrary to the Borough's position, however, a government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context. *See Widmar,* 454 U.S. at 276 (rejecting state university's contention that its interest in complying with the state constitution's prohibition on religious establishments, which was more restrictive than its federal counterpart, justified discriminating against religious speech, and explaining that "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well")[33]

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33. In 1990, a divided panel of our Court suggested in *dictum*—in a case that did not involve a Free Exercise Clause claim, and without citing *Widmar*—that public schools have "a compelling interest in maintaining the appearance of religious neutrality" in their classrooms, and that this interest, even if not required by the Establishment Clause, might outweigh public employees' free exercise right to wear religious garb. *United States v. Board of Education,* 911 F.2d 882, 889 (3d Cir. 1990) (holding that Title VII does not require public schools to allow teachers to wear religious garb, as this would impose an "undue hardship" on the schools under 42 U.S.C. § 2000e(j)). The opinions cited in support of this proposition were *Cooper v. Eugene School District,* 723 P.2d 298 (Or. 1986)—which also did not cite *Widmar*—and the Supreme Court's one-sentence order dismissing an appeal from the Oregon Supreme Court's ruling "for want of a substantial federal question." 480 U.S. 942 (1987).

To the extent that the Oregon Supreme Court held in *Cooper* that concerns about appearing neutral toward religion could outweigh

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employees' free exercise rights in the public school context, we do not believe the United States Supreme Court's summary disposition approved that reasoning. Instead, we believe, especially in light of subsequent doctrinal developments, that the *dictum* in *United States v. Board of Education* may be inconsistent with *Widmar*'s principle that an interest in more separation between church and state than the Establishment Clause requires cannot justify restricting rights shielded by the Free Exercise Clause. *See Widmar,* 454 U.S. at 276.

First, summary dispositions by the Supreme Court "cannot be taken as adopting the reasoning of the lower court," *Wis. Dep't of Revenue v. Wrigley Co.,* 505 U.S. 214, 224 n.2 (1992); *Zobel v. Williams,* 457 U.S. 55, 64 n.13 (1982) (same), and they can be used as precedent "only if the [lower court's] decision[ ] rested solely on established constitutional principles and did not break any new ground." Robert L. Stern et al., *Supreme Court Practice* § 4.29, at 284 (8th ed.2002). Hence the Supreme Court's summary disposition in *Cooper* cannot be interpreted as endorsing the Oregon Supreme Court's reasoning, particularly since that reasoning flatly contradicts *Widmar*. *See Fusari v. Steinberg,* 419 U.S. 379, 388-89 n.15 (1975) (stating that, even though a lower court's interpretation of a summary affirmance by the Supreme Court was "plausible," it was improper because it would "leave little vitality" to an earlier Supreme Court decision); *see also id.* at 391-92 (Burger, C.J., concurring) ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.").

Since *Cooper*, moreover, the Supreme Court has held in several cases that a government interest in appearing neutral toward religion, where not necessary to comply with the Establishment Clause, cannot justify limiting First Amendment rights. *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 112-19 (2001); *Rosenberger,* 515 U.S. at 839-46; *Capitol Square Review & Advisory Bd. v. Pinette,*
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Davey, 299 F.3d at 759 (same in context of free exercise claim).

The Borough further argues, however, that leaving the *eruv* in place would constitute an actual Establishment Clause violation, and that the need to avoid such a violation justifies discriminating against the plaintiffs' religiously motivated conduct. Before explaining why this argument is also unavailing, we must examine the Supreme Court's recent pronouncements in the area.[34] Until the past decade, the

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515 U.S. 753, 761-63 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 395 (1993). Because subsequent doctrinal developments remove whatever precedential authority a summary disposition inconsistent with them might have, *see Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975); *Lecates v. Justice of Peace Ct. No. 4,* 637 F.2d 898, 902 (3d Cir.1980), we believe that in all likelihood the Supreme Court summarily dismissed the appeal in *Cooper* under the principle of *Pickering v. Board of Education*, 391 U.S. 563 (1968), which held that government can impose restrictions on the First Amendment rights "of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. Nat'l Employees Treasury Union,* 513 U.S. 454, 465 (1995). Thus the Supreme Court had no need in *Cooper* to consider whether an interest in appearing neutral toward religion can trump free exercise rights outside the context of public employment.

34. Two courts have held that the Establishment Clause allows a municipality affirmatively to grant Orthodox Jews access to public property so they can create an *eruv*. *See ACLU of N.J. v. City of Long Branch,* 670 F.Supp. 1293, 1295-97 (D.N.J.1987); *Smith v. Community Bd. No. 14,* 491 N.Y.S.2d 584, 586-87 (N.Y.Sup.Ct.1985), *aff'd*, 518 N.Y.S.2d 356, 357 (N.Y. App. Div. 1987). Those cases are not on point here because the Borough has not approved the *eruv*.

Supreme Court generally applied the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), under which government action is consistent with the Establishment Clause if it (1) "has a secular purpose"; (2) "does not have the principal or primary effect of advancing or inhibiting religion"; and (3) "does not foster an excessive entanglement with religion." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).[35]

Recent Supreme Court decisions, however, have not applied the *Lemon* test. Instead, in cases involving Establishment Clause challenges to private individuals' use of government resources, the Court has applied the endorsement test developed by Justice O'Connor, which dispenses with the "entanglement" prong of the *Lemon* test and collapses its "purpose" and "effect" prongs into a single inquiry: would a reasonable, informed observer, *i.e.*, one familiar with the history and context of private individuals' access to the public money or property at issue, perceive the

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35. *Compare, e.g.*, *Widmar*, 454 U.S. at 271-75 (applying *Lemon* test to hold that Establishment Clause does not bar state university from allowing religious groups to use generally available facilities); *Lynch v. Donnelly*, 465 U.S. 668, 679-86 (1984) (applying *Lemon* test to uphold city-sponsored Christmas display that included creche alongside various secular symbols), *with Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (invalidating prayer at public school graduation led by clergyman chosen by school officials without relying on *Lemon* test); *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (upholding practice of opening state legislative sessions with prayers by state-employed chaplain without mentioning *Lemon* test); *see generally Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in the judgment) (chronicling Court's erratic invocation of *Lemon* test).

challenged government action as endorsing religion?[36] *See Zelman v. Simmons-Harris*, __ U.S. __, __, 122 S. Ct. 2460, 2468-69 (2002) (upholding school voucher program where 96% of participating students attended religiously affiliated schools because parents' genuine and independent choices determined where children went to school); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 117- 19 (2001) (holding that Establishment Clause did not require public school to bar evangelical Christian student group from using facilities accessed by various other groups);[37] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (relying on the endorsement analysis in *Lamb's Chapel* to hold that Establishment Clause did not require state to prevent private group from erecting cross on statehouse grounds, a traditional public forum);[38] *Lamb's Chapel*, 508 U.S. at 395

36. "Entanglement" still matters, however, in the context of direct aid to public schools, where the Court subsumes it within the "effect" analysis, *see Agostini v. Felton*, 521 U.S. 203, 232-33 (1997), and in the rare case where government delegates civic power to a religious group. *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-705 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982).

37. When presented with Establishment Clause claims in the context of public education, the Supreme Court considers not only whether a reasonable, informed observer would perceive an endorsement of religion, but also whether the challenged government practice coerces students into participating in religious activity. *See Good News Club*, 533 U.S. at 115-16; *Lee*, 505 U.S. at 592-93. The Court has not applied its coercion test outside the public education context.

38. Seven Justices in *Capitol Square* agreed that the reasoning of *Lamb's Chapel* controlled, *Capitol Square*, 515 U.S. at 762, three

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(reciting the *Lemon* test but relying primarily on the endorsement test to hold that the Establishment Clause did not prohibit school district from letting evangelical church group use publicly available school facilities to show film series on Christian family values); *see also ACLU of N.J. v. Schundler,* 168 F.3d 92, 103, 105-07 (3d Cir. 1999) (noting that Justice O'Connor's endorsement test is the governing standard and applying it to uphold government-sponsored holiday display against Establishment Clause attack). Each of these decisions upheld the challenged government action because it treated religion neutrally, and thus would not be viewed by a reasonable, informed observer as endorsing religion.[39]

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of these seven expressly applied the reasonable, informed observer test, *see id.* at 772 (O'Connor, J., joined by Souter & Breyer, JJ.), and the two dissenting Justices also applied the endorsement test, *see id.* at 797-98 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting). Four Justices, however, recognized that the endorsement test controls when government discriminates in favor of religion, but argued that there is no need to apply the test to "purely private" religious expression that occurs in a public forum "open to all on equal terms" because such expression can never violate the Establishment Clause. *Id.* at 770 (opinion of Scalia, J.). Notwithstanding the Justices' divergent approaches, subsequent Supreme Court decisions treat the reasonable, informed observer test discussed at length in Justice O'Connor's opinion as representing *Capitol Square*'s holding with respect to the appropriate Establishment Clause test. *See Good News Club,* 533 U.S. at 119; *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000).

39. While the Supreme Court's Establishment Clause jurisprudence consistently emphasizes neutrality toward religion, it
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In contrast, government runs afoul of the endorsement test and violates the Establishment Clause when it affirmatively supports religion on preferential terms. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 305-10 (2000) (invalidating school policy of encouraging and sponsoring student-initiated, student-led prayers before high school football games because reasonable, informed observer would perceive school as endorsing religion); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 598-601 (1989) (holding that county violated Establishment Clause by giving Roman Catholic group preferential access to display stand-alone creche depicting birth of Jesus on main staircase of its seat of government because reasonable observer would believe county's action was meant to support and promote Christianity); *see also ACLU of N.J. v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471, 1484-88 (3d Cir. 1996) (en banc) (invalidating scheme that allowed public high school students to choose graduation prayer, but not any secular speech, by plurality vote).[40] In addition, some Justices have held out the

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allows government to "accommodate religious needs by alleviating special burdens" on religious practice unless the "accommodation" delegates political power to a particular religious group or otherwise "singles out a particular religious sect for special treatment." *Kiryas Joel Village Sch. Dist.,* 512 U.S. at 705-06.

40. The *Allegheny* Court also held, with no majority opinion on this point, that local officials did not endorse religion by erecting a display including a menorah, a Christmas tree, and a sign entitled "Salute to Liberty" in front of another government building. *See* 492 U.S. at 613-21 (opinion of Blackmun, J.); *id.* at 632-36 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 663-67 (Kennedy, J., concurring in the judgment in part and dissenting in part).

possibility that, even if government grants equal rather than preferential access to religion, a reasonable, informed observer could perceive an endorsement of religion in extraordinary cases. *See Capitol Square,* 515 U.S. at 777-78 (O'Connor, J., concurring in part and concurring in the judgment). For instance, if one or more religious groups dominated property the government made available to the public, a reasonable observer might perceive an endorsement of religion. *See id.*; *cf. Freedom from Religion Found. v. City of Marshfield,* 203 F.3d 487, 489, 494-96 (7th Cir. 2000) (holding that Establishment Clause was violated where sole display in public forum was fifteen-foot-tall white marble statue of Jesus bearing inscription "Christ Guide Us On Our Way" in twelve-inch block letters and facing oncoming traffic on adjacent highway).

Applying these principles to this case, we believe that, if the Borough ceased discriminating against the plaintiffs' religiously motivated conduct to comply with the Free Exercise Clause, a reasonable, informed observer would not perceive an endorsement of Orthodox Judaism because the Borough's change of heart would "reflect[ ] nothing more than the governmental obligation of neutrality" toward religion. *Sherbert,* 374 U.S. at 409. A reasonable observer "must be deemed aware of the history and context of the community," *Good News Club,* 533 U.S. at 119 (internal quotation marks omitted); *see also Zelman,* 122 S. Ct. at 2468-69; *Black Horse Pike,* 84 F.3d at 1486, and "presumed to possess a certain level of information that all citizens might not share." *Capitol Square,* 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment); *see also Good News Club,* 533 U.S. at 118 (stating that reasonable

observer would know about non-neutral implementation of policy); *ACLU of N.J. v. Schundler,* 168 F.3d at 106 (noting that reasonable observer would be aware of city's year-round practices regarding cultural displays and celebrations). Thus the reasonable, informed observer would know that the *lechis* are items with religious significance and that they enable Orthodox Jews to engage in activities otherwise off limits on the Sabbath, but would also know that the Borough was allowing them to remain on the utility poles only because its selective application of Ordinance 691 renders removing the *lechis* a free exercise violation. *See Allegheny,* 492 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment) ("In cases involving the lifting of government burdens on the free exercise of religion, a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement."). Cognizant of the Borough's secular purpose of complying with the Free Exercise Clause, *see Mergens,* 496 U.S. at 249, and the religion-neutral effect of treating the *lechis* like other postings, the reasonable observer would not believe that the Borough was promoting Orthodox Judaism. *See Gregoire v. Centennial Sch. Dist.,* 907 F.2d 1366, 1380 (3d Cir. 1990) (concluding that religion-neutral treatment of Christian group seeking access to public school facilities sent message of neutrality toward, not endorsement of, religion). This is true *a fortiori* because there is no evidence in the current record that the unobtrusive *lechis* are intended to send a religious message to anyone.

Further, there is a vital difference between purely private religiously motivated conduct and conduct initiated or

sponsored by government. *See Rosenberger,* 515 U.S. at 841. No reasonable, informed observer would perceive the decision of the plaintiffs to affix *lechis* to utility poles owned by Verizon and to do so with Cablevision's assistance as "'a choice attributable to the State.'" *Santa Fe Indep.,* 530 U.S. at 311 (quoting *Lee,* 505 U.S. at 587). Similarly, because the *eruv* is maintained solely with private funds, and because allowing the *lechis* to remain in place would represent neutral rather than preferential treatment of religiously motivated conduct, no reasonable, informed observer would believe the Borough is "affirmatively sponsor[ing]" an Orthodox Jewish practice. *Santa Fe Indep.,* 530 U.S. at 313.

To the extent that access to the utility poles on Borough land constitutes a "benefit," "the 'guarantee of neutrality is respected, not offended'" when religious persons benefit incidentally from "'neutral criteria and evenhanded policies.'" *Good News Club,* 533 U.S. at 114 (quoting *Rosenberger,* 515 U.S. at 839). In this context, there is "no realistic danger" that, if the Borough treated the plaintiffs' religiously motivated conduct on religion-neutral terms, reasonable, informed observers would perceive an endorsement of Orthodox Judaism. *Lamb's Chapel,* 508 U.S. at 395. Moreover, even if there is some slight risk that a reasonable, informed observer might "misperceive the endorsement of religion," there is a much greater risk that the observer would perceive hostility toward Orthodox Jews if the Borough removes the *lechis. Good News Club,* 533 U.S. at 118; *Mergens,* 496 U.S. at 248; *see also Rosenberger,* 515 U.S. at 846 (O'Connor, J., concurring) ("Withholding

access would leave an impermissible perception that religious activities are disfavored.").[41]

Because the Free Exercise Clause requires neutral treatment of religion, *see Smith,* 494 U.S. at 879, only in a most unusual case could compliance with free exercise norms offend the Establishment Clause. *Cf. Kiryas Joel Village Sch. Dist.,* 512 U.S. at 717 (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.") (emphasis in original). This is not such a case. Therefore, the Borough has no Establishment Clause justification for discriminating against the plaintiffs' religiously motivated conduct. Accordingly, the plaintiffs are reasonably likely to prevail on their free exercise claim.

3. Requirements for preliminary injunctive relief

Where a district court has denied a motion for a preliminary injunction, we may order the injunction to issue if "the four factors required to grant a preliminary injunction are apparent on the record before us." *Tanimura & Antle,*

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41. To the extent that the *Lemon* test retains some trace of vitality, *see Black Horse Pike,* 84 F.3d at 1484, even after *Zelman, Good News Club,* and *Santa Fe* eschewed it in favor of the endorsement test, it does not support the Borough's Establishment Clause defense. Allowing the *eruv* to remain in place serves the secular purpose of complying with the Free Exercise Clause, does not have the effect of advancing religion because no reasonable, informed observer would perceive an endorsement of religion, and involves no government entanglement with religion because the Borough will not monitor or support the maintenance of the *eruv.*

Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132, 140 (3d Cir. 2000); *see also Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997); *Polaroid Corp. v. Disney*, 862 F.2d 987, 1006 (3d Cir. 1988). Our review of the record leaves us convinced that, in addition to the reasonable probability that the plaintiffs will ultimately prevail on their free exercise claim, the remaining three factors for injunctive relief—irreparable injury, the balance of hardships, and the public interest—also favor a preliminary injunction. Limitations on the free exercise of religion inflict irreparable injury. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) ("'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The plaintiffs have demonstrated that, if the *eruv* is removed, they will be unable to push and carry objects outside the home on the Sabbath, and those who are disabled or have small children consequently will be unable to attend synagogue. This showing easily satisfies the irreparable injury requirement.

With respect to the balance of hardships, a preliminary injunction would not harm the Borough more than denying relief would harm the plaintiffs. Enjoining removal of the *eruv* would cause neither the Borough nor its residents any serious injury. Without an injunction, on the other hand, the plaintiffs' free exercise of religion will be impaired. The balance easily tips in the plaintiffs' favor.

Finally, where there are no societal benefits justifying a burden on religious freedom, "the public interest clearly favors the protection of constitutional rights." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997). We do not see how removing the *lechis* could advance any interests sufficient to outweigh the infringement of the plaintiffs' free exercise rights.

In this context, the District Court should have preliminarily enjoined the Borough from removing the *lechis* pending a trial.

IV. Conclusion

Though the plaintiffs are not likely to prevail on their Fair Housing Act claim and do not present a viable free speech claim, they are reasonably likely to show that the Borough violated the Free Exercise Clause by applying Ordinance 691 selectively against conduct motivated by Orthodox Jewish beliefs. Because the three other factors for injunctive relief also favor the plaintiffs, we reverse the District Court's denial of injunctive relief and will enter an order directing the Court to issue a preliminary injunction barring the Borough from removing the *lechis*.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3301

TENAFLY ERUV ASSOCIATION, INC.; CHAIM BOOK; YOSIFA BOOK; STEPHANIE DARDICK GOTTLIEB; STEPHEN BRENNER,

Appellants

v.

THE BOROUGH OF TENAFLY; ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly; CHARLES LIPSON; MARTHA B KERGE; RICHARD WILSON; ARTHUR PECK; JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly

Appeal from the United States District Court for the
District of New Jersey
(D.C. Civil Action No. 00-cv-06051)
District Judge: Honorable William G. Bassler

Argued March 21, 2002

Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on March 21, 2002;

Appendix A

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated August 10, 2001, is hereby REVERSED and the District Court is directed to issue the preliminary injunction requested by Appellants. All of the above in accordance with the opinion of this Court. Costs taxed against Appellees.

ATTEST:

s/ [illegible]
Acting Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED AUGUST 9, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. CIV. 00-6051 (WGB)

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB AND STEPHEN BRENNER,

Plaintiffs,

v.

The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

* * *

OPINION

Appendix B

BASSLER, District Judge:

The individual Plaintiffs and the Tenafly Eruv Association, Inc., wish to maintain a ceremonial religious demarcation, known as an *eruv,* in the Borough of Tenafly's municipal right-of-way. Specifically, Plaintiffs seek permission to maintain plastic strips, known as *lechis,* on utility poles in the right-of-way. The Borough of Tenafly, by vote of its Borough Council, denied Plaintiffs' request and ordered that the *lechis,* which had already been attached to the poles without Borough permission, be removed.

Plaintiffs contend that this denial violated their rights to Free Exercise of Religion and to Free Expression under the First Amendment to the Constitution, and their civil rights as protected by 42 U.S.C. §§ 1983 and 1985. Plaintiffs do not raise a claim under the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs do claim that the Borough Council violated their rights under the Fair Housing Act, 42 U.S.C. § 3604(a). Plaintiffs now seek to enjoin Defendants from removing the *lechis.*

I. BACKGROUND

A. *Procedural History*

On December 15, 2000 Plaintiffs Tenafly Eruv Association, Inc., Chaim Book, Yosifa Book, Stefanie Dardick Gotlieb, and Stephen Brenner (collectively "TEAI" or "Plaintiffs"), filed a complaint with the Court, alleging violations of the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983 and 1985, and the Federal Fair Housing Act ("FHA") 42 U.S.C. § 3604.

Appendix B

In addition to damages, Plaintiffs sought entry of an Order to Show Cause why a preliminary injunction should not be issued, and for the imposition of temporary restraints. Plaintiffs sought to preliminarily enjoin Tenafly or anyone acting in concert with the town from removing or otherwise disturbing the *lechis* that delineate the boundary of the *eruv*.

After a hearing, the Court entered the Order to Show Cause, and issued a temporary restraining order to prevent interference with or removal of the *eruv*, pending a preliminary injunction hearing. Pursuant to the Order to Show Cause, a preliminary injunction hearing was scheduled for January 2, 2001.

By consent of the parties, temporary restraints were continued and the preliminary injunction hearing postponed to allow time for limited discovery. Once the parties had completed limited discovery, the Court held an evidentiary hearing, which took place on four separate days during April and May of 2001. After a period for the submission of additional briefing and factual affidavits, the Court heard oral argument on July 19, 2001.

This Opinion is based on evidence developed at the evidentiary hearing and on evidence submitted by affidavit. The Court has also relied upon the exemplary briefs prepared by Plaintiffs, Defendants, and the American Civil Liberties Union ("ACLU")[1] of New Jersey. This Opinion contains the Court's findings of fact and conclusions of law pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure.

1. Appearing by leave of the Court as *amicus curiae*.

Appendix B

To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

B. *Eruv Background*

1. *Eruvs Generally*

An *eruv* is a ceremonial demarcation of an area, which has its roots in Jewish Law. According to one of Plaintiffs' experts:

> the institution of the *eruv* has been practiced by the Jewish people for over 2,000 years. It is based on principles derived from the Bible which are developed in the Talmud and codified in the Codes of Jewish Law. . . . [T]here is an entire tractate of the Talmud which deals with the subject.

(Rabbi Schachter Aff. ¶ 3.)

In the most rudimentary terms, Orthodox Jews believe that Jewish Law bars them from lifting, carrying, or pushing objects (i.e. pushing a wheelchair or carrying an infant) beyond the confines of their homes on the Sabbath. For those who acknowledge its legitimacy, the *eruv* creates a legal fiction, which converts the public domain to a private domain, solely for purposes of lifting, carrying, or pushing on the Sabbath. This allows those who acknowledge the legitimacy of the *eruv* to engage in activities on the Sabbath that are otherwise prohibited by Jewish Law.

Appendix B

The Court adopts the following uncontested definition of an *eruv:*

> An *eruv,* under Jewish law, is an unbroken physical delineation of an area. In tangible terms, it is a defined area created from either natural barriers or artificial means, such as from wires strung across poles. The boundaries of the *eruv* must resemble a series of doorways. In this case the *eruv* consists of existing horizontal wires and vertical black rubber coated casings, known as "*lechis,*" which serve as the sides of the symbolic "doorway."
>
> The *eruv* permits those Orthodox Jews who acknowledge the legitimacy of the *eruv* under Jewish Law to carry or push objects from their residences, i.e. private property, onto other private or public property and vice versa on the Jewish Sabbath and Yom Kippur. These are activities that Orthodox Jews believe are prohibited by Jewish law on the Sabbath and Yom Kippur absent the legal fiction of a private domain. (Shapiro Second Suppl. Cert. Ex. H; Defs.' Proposed Findings of Fact at 6-7.)[2]

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2. This definition is largely based on the definition of an *eruv* adopted by the court in *Smith v. Community Bd. No. 14,* 491 N.Y.S.2d 584, 585 (Sup. Ct. Queens Cty. 1985.)

Appendix B

Defendants submit that the definition of an *eruv* is not complete without an additional paragraph:

> In order to create an efficacious *eruv* under Jewish law, persons creating the *eruv* must rent the enclosed public and private property for valuable consideration from a government official authorized to control the enclosed area.

(Defs.' Proposed Findings of Fact at 7.) While Defendants contend the paragraph describes a "basic fact that is fundamental to the definition of an *eruv*," (*Id.*), Plaintiffs object on grounds that the paragraph does not define what an *eruv* is, and that it is misleading absent extensive additional language. (Shapiro Second Suppl. Cert. ¶ 10.)

Certainly a ceremonial governmental proclamation, conveying some sort of governmental recognition of the area encompassed by an *eruv*, is a factor in establishing an *eruv*. This conclusion is supported by Plaintiffs' efforts to obtain such a proclamation first from the Borough of Tenafly, and then from Bergen County. (*See* Opinion Section I(C)(3), *infra*.) Nevertheless, Defendants' definition is misleading to the extent it does not make plain the narrow, legally fictive nature of the rental proclamation.

Additional reconciliation of the competing definitions of an *eruv* is not critical to resolution of the issues pending before the Court. Because the ceremonial proclamation issued in this dispute by Bergen County Executive William P. Schuber on December 15, 1999 is referred to frequently by

the parties and is demonstrative of the general nature of such proclamations, the Court reproduces it in its entirety:

PROCLAMATION

WHEREAS, in accordance with the Jewish Orthodox faith the law of the Sabbath contains commandments prohibiting the pushing and carrying of articles on the Sabbath and other Jewish holy days in the public domain except within certain specified conditions; and

WHEREAS, the delineation of an eruv and its construction creates the legal fiction of a private domain in which observant persons of the Jewish faith are permitted to carry or push objects from place to place within the defined area during the Sabbath and other holy days; and

WHEREAS, the office of the Bergen County Executive has been petitioned by the Tenafly Eruv Association, Inc., on behalf of those of the Jewish faith who reside within the County of Bergen, bounded by Booth Avenue and Tenafly Road in Englewood; the Borough of Tenafly; Madison Avenue, Knickerbocker Road and Truman Drive in Cresskill; to rent according to Jewish law, to the Tenafly Eruv Association, Inc, for a period of 30 (thirty) years at a rental rate of one dollar ($1.00), in hand paid, the rights to the aforesaid area for the sole purpose of carrying and/or pushing articles on the Sabbath and Jewish holy days; and

Appendix B

WHEREAS, the office of the Bergen County Executive deems it to be in the public interest of those of its residents for whom the petition has been presented be granted the rights described in the petition; Now therefore,

I, WILLIAM P. SCHUBER

Executive of the County of Bergen, New Jersey do hereby proclaim Wednesday, December 15, 1999 as,

A GRANT OF RIGHTS IN BERGEN COUNTY

The said eruv shall not be valid or binding for any other purpose and this proclamation creates no rights, duties or obligations enforceable in any court whether in law or in equity. This proclamation shall not diminish, increase or affect any other rights granted under New Jersey law, nor shall it be deemed to authorize any physical construction that would otherwise require permission from any local municipal, county or state boards.

(Pls.' Ex. 18, hereinafter the "Bergen Proclamation.")

The Bergen Proclamation is typical of the ceremonial proclamations establishing *eruvs* in other municipalities, such as: Washington, D.C.; Philadelphia, Pennsylvania; Baltimore, Maryland; Cincinnati, Ohio; Charleston, South Carolina; and Jacksonville, Florida. (Proclamations attached to Chaim Book Cert. as Ex. B.)

Appendix B

All of these proclamations delineate the geographic area that will be bounded by the *eruv,* and rent that area to the group seeking to establish the *eruv* for the sum of $1.00. (*See id.*) All of the proclamations also clearly state that the rights to the domain encompassed by the *eruv* are conveyed for the sole or limited purpose of pushing and carrying on the Sabbath and other Jewish holy days. (*See id.*)

Separate from their disagreement about what constitutes an *eruv,* the parties also disagree about an *eruv's* significance. Defendants contend that the *eruv* is a religious symbol. (Tr. of April 25, 2001 Court Hearing ("4/25/01 Tr.") at 13:7.) Plaintiffs, on the other hand, say that it is not a religious symbol, but that it has religious significance. (*Id.* at 13:11-12.) Again the dispute is not significant for purposes of this Opinion, for even if an *eruv* is not a religious symbol such as a cross or a menorah, it is sufficient for the Court's analysis to conclude that it has religious significance, as Plaintiffs themselves acknowledge.

In practical terms, according to the testimony of an *eruv* proponent, while Observant Jews may live in a town without an *eruv,* it does significantly enhance the practice of their religion. (Test. of Charles Agus, May 1, 2001 ("Agus Tr.") at 122:11-12.) It allows those who recognize it to attend synagogue with their young children in a way that would not be possible without an *eruv.* (Agus Tr. at 123:22-25.) It would also allow them to visit their friends' homes or visit the park on the Sabbath (assuming those places were located within the confines of the *eruv*), while carrying objects or pushing a stroller. (Stefanie Dardick Gotlieb Cert. ¶ 5; Yosifa Book Cert. ¶ 5.) Plaintiffs contend that believers in the necessity

of an *eruv* who are presently seeking to move to Tenafly might elect not to do so if the *eruv* is not permitted. (Stephen Brenner Cert. ¶ 6.)

2. *The Eruv in Tenafly*

Geographically, the Tenafly *eruv* encompasses an area roughly bounded to the south by the border with Englewood and to the north by Hudson Street in Tenafly. (12/7/00 Letter from Chaim Book to the Mayor and Council of Tenafly, attached to Shapiro Second Supp. Cert. as Ex. F, at 2.) The eastern boundary of the *eruv* runs from Berkley Drive to Ridge Road to Woodland Street, in Tenafly. (*Id.*) The western border is Tenafly Road. (*Id.*) The area links to an existing *eruv* in neighboring Englewood, making it possible for *eruv*-observant Jews to pass into Englewood on the Sabbath while pushing or carrying objects. (*Id.*) An examination of Joint Exhibit 1, a map of Tenafly delineating the boundaries of the *eruv*, suggests that 35% to 40% of the Borough of Tenafly is located within the current perimeter of the *eruv*.

Physically, the Tenafly *eruv* consists first of the contiguous perimeter of existing, overhead utility lines that run along the streets at the boundary of the *eruv*. These overhead lines form the "tops" of the symbolic "doorways" as described in Plaintiffs' and Defendants' agreed-upon definition of an *eruv*. In order to convert these active overhead utility lines into an *eruv* under Jewish Law, Plaintiffs were required to attach *lechis* vertically to the utility poles, to form the "sides" of the symbolic "doorways." *Lechis* were attached to approximately 183 utility poles in Tenafly. (Joint Ex. 2.)

Appendix B

In the Tenafly *eruv,* each *lechi* is comprised of the same hard black plastic material as is used by Verizon to cover its ground wires. Plaintiff's Exhibit 34 is an actual section of the *lechi* material used in Tenafly. It is U-shaped, approximately three-quarters of an inch wide by one-half inch deep. When applied to the poles, the *lechi* runs vertically from the ground to the top of the utility pole. (Pls.' Exs. 35(a)-(b).)

Unless a person knew which plastic strips had been hung by Verizon, and which had been hung by Plaintiffs, it would be absolutely impossible to distinguish between a *lechi* and a covered Verizon ground wire. This is demonstrated by Plaintiffs' Exhibits 35(a) and 36(a), photographs that the Court has attached to this Opinion as Appendix A. Exhibit 35(a) pictures a *Lechi;* Exhibit 36(a) a Verizon ground wire cover. After careful observation, the only difference apparent to the Court is that the Verizon ground wire cover is more weathered than the *lechi,* presumably because it has been on the pole for a longer period of time.

C. *Events Leading to Tenafly's Denial of Permission for the Eruv*

The chronology of events leading to the attachment of the *lechis* to the utility poles in Tenafly's right-of-way and the subsequent denial of the request to leave them in place is largely undisputed. Vehemently contested, however, are the motivations of the individuals involved.

Appendix B

1. *Initial Meeting with Tenafly Mayor Ann Moscovitz*

The first contact between supporters of an *eruv* and the Tenafly Borough government occurred on June 1, 1999.[3] On that date, Mr. Erez Gotlieb and Mr. Gary Osen met with the Mayor of the Borough of Tenafly, Ann Moscovitz, in her office, to discuss the creation of an *eruv* to encompass the Borough of Tenafly. (Moscovitz Aff. ¶ 3.) The gentlemen explained the nature and purpose of an *eruv,* and then sought, in exchange for modest compensation, to have the Mayor issue a ceremonial "rental" proclamation, which would allow the *eruv* to be created under Jewish law. (*Id.*)

While the Mayor had no objection at the time, she indicated to Messrs. Gotlieb and Osen that she did not have the authority to grant or deny such a request, and that a formal proposal would have to be made to the Borough Council. (Moscovitz Aff. ¶ 4.) The Mayor agreed to raise the issue at the Council's next work session. (*Id.* ¶ 5.)

2. *The Tenafly Borough Council Work Session of July 8, 1999*

As she had told Messrs. Gotlieb and Osen, the Mayor did raise the possibility of erecting an *eruv* in Tenafly at a Borough Council work session on July 8, 1999. (*See* July 8,

3. While the Tenafly Eruv Association, Inc. would eventually make the application to Tenafly for permission, conflicting testimony was given about who comprised TEAI's membership. In the interests of clarity, the Court will refer interchangeably to TEAI, its members, and to non-member supporters of the Tenafly *eruv.*

1999 Borough of Tenafly Work Session Tr. ("7/8/99 Tr."), attached to Shapiro Cert. as Ex. A.) In Tenafly, members of the public are always invited to attend and listen to these Borough work sessions, but are generally not invited to speak. (Moscovitz Aff. ¶ 5; Borough of Tenafly Council Member Charles Lipson Aff. ("Lipson Aff.") ¶ 2.) The Mayor and Council can make exceptions to this rule, and at the July 8, 1999 work session, the Council voted to allow the approximately thirty residents who attended to voice their opinions on the *eruv*. (*Id.* ¶ 6.)

At the Work Session, the Mayor advocated the *eruv* proposal. For example, the Mayor stated that:

> [I]t's something that could never [be] seen by anybody[;] [there] is nothing significant about this. Anybody not looking for it would [never] know it was even there. It's not an obvious thing but allows these people to bring their children to temple. That's all. You know, whether it makes sense to you or not is not really important. . . . I mean we don't have to agree with everyone's religion . . .

(7/8/99 Tr. at 2.)[4] Shortly thereafter, the Mayor commented:

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4. The transcript of the July 8, 1999 work session was unofficially prepared by counsel for Plaintiffs. (Shapiro Cert. ¶ 2.) Defendants have not objected to either its authenticity or its admission into evidence. The Court will cite to speakers at the hearing by name to the extent that the transcript, other pleadings, or a review of the audio tape of the hearing make the speaker's identity apparent. Any unidentified speakers will be referred to as Man #1, Woman #3, etc.

> It's such an innocuous thing. It's something that nobody can see or know that's there. It's a religious thing, and we have a reputation in this town of permitting people to go to whatever church they wish to go to or temple they wish to go to and to bring their children.

(7/8/99 Tr. at 4.) The Mayor stated she "would be very upset if this Council did not permit such a simple request." (7/8/99 Tr. at 5.)

The Work Session did not focus on whether permission should be granted for use of municipal property for an *eruv,* or whether such permission was required. Instead, the Mayor indicated that "[t]he only reason really that it has to come before us here is because they have to give us something, they have to rent it for the purpose of being an *Eruv*." (7/8/99 Tr. at 4.) In fact, it appears that the Council's only concern was whether to issue the ceremonial proclamation:

> Mayor: It's certainly [not] as obvious as having a creche in Highland Park. You know it's just municipal property. I'm not sure we can even stop them from doing it, but, you know, it's not.
>
> [Lesnevich]:[5] You can stop them. They can't force you to rent it to them for a dollar, they can do whatever they

5. Borough Attorney Walter Lesnevich.

want as far as calling it what they want within their concept but they could not force you to sign an ordinance renting it.

Man: I was told they can deal directly with the Cable Company.

[Lesnevich]: If they dealt with the cable company it's nothing you can do about it because Cablevision can do, they have the right to do that.

Man: That was my understanding.

* * *

[Kerge]:[6] I think the issue really, probably has to do with a recognition, their recognition of their being able to do it. If they can go directly to cable and they don't need to rent, to have any agreement from us, then why not do that. Wouldn't that be easier?

[Lesnevich]: I don't know perhaps. I certainly don't know the answer. Their

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6. Tenafly Borough Council member Martha Kerge. At the time she made this statement, she was not clear whether the wires or the poles where on Borough property, and thus whether the permission of the Council to erect the *eruv* was required. (Kerge Aff. ¶ 3.)

> theology requires that government, governmental entity to give the rental as opposed to a commercial enterprise.

(7/8/99 Tr. at 6-7.)

Notably absent from the Council's discussion was any mention that even if permission were granted by the telephone or cable companies to use the poles, permission would still be required from the Borough to use the municipal right-of-way. As Plaintiffs correctly note, Borough Counsel Walter Lesnevich did not mention that municipal approval would be required not only for issuance of a ceremonial proclamation, but also for use of the Borough's right-of-way. (Chaim Book Cert. ¶ 14.)

For the remainder of the hearing, the Council and public discussed the propriety of issuing the ceremonial "rental" proclamation, and what impact that proclamation and the attendant establishment of an *eruv* might have on Tenafly. The meeting was contentious, and numerous members of the public voiced their objections to the *eruv*. The mayor herself was "shocked and dismayed by the reaction of some of the residents present." (Moscovitz Aff. ¶ 6.)

The statements in opposition to the *eruv* were initially innocuous. For instance, one person who spoke stated:

> suppose another religion comes before us and they ask us to allow them to do something that's for their religion. I don't know what that religion

> could be or what it is, but once we establish the fact that we do something special for one particular sect of a religion we open ourselves to allow, again to allow anybody and use that as a precedent to establish whatever they want to do.

(7/8/99 Tr. at 6.)

Discussions quickly turned away from the precedent that might be set for other groups, and to concerns that had been voiced to the Council by some residents that the establishment of an *eruv* might lead to the formation of an Orthodox community in Tenafly:

Man:[7]	. . . Some of my Jewish friends object[ ] to this very strongly and you know, Jewish faith and tell me why?
Mayor:	I have no answer for you.
Man:	I've heard why.
Mayor:	Why?
Man:	They think we're going to turn it into an Orthodox Community.
Mayor:	Really? Are we going to become Orthodox because of wires going on the poles?

7. The Court believes that the man with whom the Mayor spoke in this conversation was a Borough Council member.

Man: That's a stretch. That's a real stretch.

Mayor: That's a real stretch. I'm not going to become Orthodox, see?

Man: I'm not impugning any religion at this point in time. I'm not imputing the Orthodox at all, but that seems to be a concern that the Orthodoxy would take over.

Mayor: That's what Adrian Meltzer said I believe when she voted against having the Lubavitch in town in the first place. I think that's a terrible thing to do. I cannot believe it.

(7/8/99 Tr. at 7.)

This theme was echoed by many of those who got up to speak after the work session was opened to the public. For example, one resident stated that an *eruv* "[i]n essence has the potential for changing the entire character of the community." (7/8/99 Tr. at 9.) He noted that in a community where his brother had lived, after the creation of an *eruv* "the entire community changed over a period of five to ten years to the point where shopkeepers were ostracized if they kept their shops open on Saturday on the Sabbath." (*Id.*) The resident continued:

> It is not simply a matter of being able to carry your child to the synagogue, they have been able

> to go to synagogue for five years with nobody interfering. This is something that has considerable implications in terms of changing the social community. It makes it part of their private domain. I personally object to the use of our public property to converting it to anyone's private domain. . . . I just know the social changes as [Councilman Lipson] intimated it is more than this simple innocuous thing. I have no intent in becoming involved in trying to keep out certain religions and this is not a matter of anti-Semitism or keeping out any religion or any church. It's a matter of not allowing any church or any religion to impose their beliefs and their use of our public properties beyond what it should be.

(*Id.* at 9-10.)

The next resident to speak against the *eruv* began by echoing concerns that the grant of a ceremonial proclamation to proponents of the *eruv* might constitute a violation of the separation between church and state. (7/8/99 Tr. at 12.) His comments then shifted to a concern for the community impact of the Borough's decision. He stated:

> Well, they start to insist that shops close on Saturday. If they start to try to think of the neighborhood as their sole possession. The attitudes of community change. So, I would say this is not a simple issue about cables on poles. This is much more an issue the character of a community being committed to diversity rather

> than beginning to be separate sectors supporters of a town. And therefore I very strongly oppose this as a person who absolutely would be there at the drop of a hat to protect their free exercise of religion. This is not about that.

(7/8/99 Tr. at 12-13.)

In response to the comments, the Mayor asked whether there was a concern about the symbolic rental of the town. (*Id.*) The Mayor noted that while a symbolic rental of Tenafly had concerned her as well:

> Having the wires go up and having, symbolically wrap around the town didn't bother me at all because it's something that isn't seen, it isn't an imposition on anybody else, anymore than having a little k with a circle on your margarine is going to make you kosher. . . . The part that really was a concern to me was the word rental. That they were renting the city of Tenafly.

(*Id.*)

Speakers again reiterated their concern about the *eruv's* potential to change the community:

> I think that Tenafly, that most of us would agree that the community is very diverse, and the people of all nationalities and all religions, I mean, there's no block in town that's like Korean or a Chinese quarter. It's a small town and the beauty of it is

> the diversity and the richness and that's what I think we're all about. I would worry that by our giving this, we're saying that they have a right to have a community in our community, and our community is so small, it's not like we're so big that they need to congregate in one area. . . . I just don't see a need to give this to them because we're all about diversity and they're free to wherever they want.

(7/8/99 Tr. at 14-15.)

The last member of the public to speak at the work session voiced her thoughts on an *eruv's* impact on nearby Teaneck, New Jersey. (7/8/99 Tr. at 18-19.) During Tenafly's debates on whether an *eruv* should be constructed, the social changes in Teaneck were oft-cited worst-case examples of the impact an *eruv* might have on a community. In the citizen's opinion, the Council should:

> Just take a look at what happened in Teaneck. Teaneck was beautiful. I love this area. I've lived here for 65 years. I used to shop in Teaneck when I lived in Englewood. Teaneck had beautiful stores. Almost every store in Teaneck today is geared towards the Orthodox. There is a racial imbalance in the school system in Teaneck because most of the Orthodox children go to Yeshivas and they go to religious ____. Who's left in the Teaneck school system but those children [who] can not afford to go to a private school. There is a serious imbalance there and I

> have concern that this could possibly happen to Tenafly because the more . . . If this is granted, let's all be honest, more and more Orthodox people are going to move here. The more people that move here, they're not going to buy their meat in the Grand Union, they're going to want to go to Glat Kosher Orthodox store. They're going to be looking to open up businesses in Tenafly. They're going to have the same thing that happened in Teaneck. This is my concern. I have no children in school anymore, but I am concerned about the school system, and I am concerned about what will come in to our local shopping areas. And I think that we should seriously consider this.

(7/8/99 Tr. at 19.)

As the hearing drew to a close, a member of the Council[8] implored those present that:

> I'm serious. We can't be flippant. This is a very serious concern . . . . [a]nd it's a concern that I have . . . that's expressed from, by a lot of people about a change in the community. And it's true, it does become a change in the community. It's become a change in every community where an ultra-orthodox group has come in. They've willed the change. They've willed a change in the state of Israel. They've willed it so much so that they've

8. The Court believes this statement was made by Councilman Charles Lipson. (Chaim Book Cert. ¶ 14; Lipson Aff. ¶ 3.)

> stoned cars that drive down the streets on the Sabbath. Ultra-Orthodox. My friend's son became an Ultra-Orthodox person so I'm not ____ that's that person's belief if that's that person's belief, and that person has the right to have that belief and I'm not denigrating that belief....

(7/8/99 Tr. at 19.)

At the conclusion of the Work Session, the Council decided without a vote not to pursue the *eruv* issue unless a formal, written request was made of the Council. (*Id.* at 21.) At the time this decision was made, members of the Council were aware that Tenafly had been threatened with suit in an unrelated religious matter, and that the Borough had been the subject of past litigation in a religious dispute.[9] (*Id.* at 10.)

The Mayor agreed to inform the gentlemen she had spoken with about the need for a formal written request for issuance of a ceremonial proclamation, and that the matter could be placed on the calendar for September if they so

9. While the Court is not familiar with all of the facts, from the hearing transcripts it appears to the Court that Tenafly was either involved in or threatened with litigation surrounding the zoning of the Lubavitch Jewish temple in Tenafly, and surrounding a creche and menorah in one of its public parks. The litigation as to the creche seemingly placed Tenafly between an ACLU Establishment Clause claim on one side, and a Lubavitch Free Exercise claim on the other. According to Tenafly Borough Administrator Joseph DiGiacomo, the Tenafly Borough Attorney is presently drafting an ordinance to permit such installations. (Test. of Joseph DiGiacomo, April 30, 2001 ("DiGiacomo Tr.") at 26:5-27.)

desired. (*Id.* at 21-22.) After the meeting, the Mayor contacted Mr. Gotlieb on the phone (since neither he nor Mr. Osen had been at the work session), and informed him that because of concerns she and others had with the symbolic rental of the streets of Tenafly, she did not feel the Council was favorably disposed to grant the application for issuance of a ceremonial proclamation. (Moscovitz Aff. ¶ 6.) Nonetheless, the Mayor did invite Mr. Gotlieb to make a formal application and proposal at a public meeting, so that there would be an official public vote. (*Id.* ¶ 7.) No such formal application was made to the Borough Council prior to the construction of the Tenafly *eruv*.

3. *Construction of the Tenafly Eruv*

Realizing that the Tenafly Borough Council was not likely to issue the ceremonial proclamation they sought, in or about August of 1999 representatives of TEAI approached the office of Bergen County Executive Pat Schuber and asked if he would issue the ceremonial proclamation. (Chaim Book Cert. ¶ 16.) Since Tenafly is within Bergen County, a proclamation from the County Executive would be sufficient for TEAI's purposes, and allow them to erect an *eruv* according to Jewish Law. (*Id.*)

Plaintiffs assert that they were informed by Bergen County's legal counsel that there was no legal impediment to Bergen County's issuing the proclamation they sought, and that Executive Schuber had agreed to do so. (Chaim Book Cert. ¶ 17.) On or about December 15, 1999, Bergen County Executive Schuber issued the ceremonial proclamation. (Chaim Book Cert. ¶ 18; Pls.' Ex. 18.)

Appendix B

With ceremonial proclamation in hand, Plaintiffs claim to have had a good faith belief that approval of the Tenafly Borough Council was not necessary to use the utility poles and that approval of Bell Atlantic Telephone Company (subsequently re-named and referred to hereinafter as "Verizon"), the owner of the poles, would suffice. (Chaim Book Cert. ¶ 19.) The Court finds this assertion to be credible. The Court reaches this conclusion because after a review of the July 8, 1999 Work Session transcript and audio recording, a reasonable witness to those proceedings could have concluded that while Borough permission was required for issuance of a ceremonial proclamation, someone seeking to hang wires on the utility poles could contact either the telephone or cable company directly. (*See, e.g.*, 7/8/99 Tr. at 6-7.)

Acting upon this good faith belief, in April, 2000 Plaintiff Chaim Book sought Verizon's permission to attach the *lechis* necessary for the *eruv* to Verizon's poles.[10] (Chaim Book Cert. ¶ 19.) Prior to granting permission to use the poles, Verizon required that TEAI complete Verizon's standard *eruv* license agreement and secure adequate insurance for the *eruv* materials. (*Id.* ¶¶ 20- 22.)

Verizon also requested evidence of the legal authority TEAI had to place and maintain *eruv* materials on the utility poles in Tenafly. (Chaim Book Cert. ¶ 20.) Plaintiffs claim that they informed Verizon about the Bergen Proclamation

10. It is undisputed that the utility poles themselves are the property of Verizon. *See* Tenafly Ordinance 1127, "An Ordinance Granting Permission and Consent to New Jersey Bell Telephone Company . . ." (Walter Lesnevich Suppl. Sub. Of 7/20/01.)

and about their belief that local municipal approval was not required. (*Id.*) Plaintiffs further assert that an in-house attorney for Verizon engaged in independent legal research as to whether local municipal approval was required and concluded that it was not. (*Id.*) Apparently satisfied that all legal requirements had been met, on June 5, 2000 Verizon granted TEAI permission to use its poles. (*Id.* ¶ 21.)

In mid-June, 2000, Cablevision, holders of the cable television franchise in Tenafly, agreed to assist Plaintiffs in affixing the *lechis* to Verizon's utility poles as a community service. (Chaim Book Cert. ¶ 24.) Cablevision provided the personnel and trucks for this undertaking. (*Id.*) With the assistance of Cablevision, the Tenafly *eruv* was completed in September, 2000. (*Id.*) Plaintiffs represent that because the *eruv* will remain privately supported, no municipal maintenance will be required. (*Id.* ¶ 51.)

4. *Tenafly's Response to the Eruv*

In late August, 2000, the Borough of Tenafly became aware that an *eruv* had been constructed without its permission, when residents adjacent to the Tenafly Nature Center informed Councilwoman Martha Kerge, the Mayor, and the administration that a wire had been hung through the Nature Center. (Moscovitz Aff. ¶¶ 10-11; Kerge Aff. ¶ 5.)[11] Since no permit had been issued to hang this wire, the Mayor ordered the wire be removed. (*Id.*)

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11. Borough Administrator DiGiacomo submitted in his affidavit that he heard about the wires in or near the nature center in December, 1999. (DiGiacomo First Aff. ¶ 1.) The Court is not aware of any other evidence that indicates an *eruv* was under construction at such an early date.

When it came to the Mayor's attention that Bergen County Executive Pat Schuber had issued the ceremonial proclamation, she contacted his office "to complain about the propriety of his issuing a proclamation concerning the use of our municipal property." (Moscovitz Aff. ¶ 12.) Plaintiffs claim that Executive Schuber's Chief of Staff informed the Mayor that Mr. Schuber had no plans to rescind the proclamation, as it constituted a reasonable community accommodation. (Chaim Book Cert. ¶ 29.)

Councilwoman Kerge also contacted the Bergen County Executive, to question Mr. Schuber's authority to issue a proclamation binding on Tenafly. (Kerge Aff. ¶ 4.) Plaintiffs claim that Councilwoman Kerge not only questioned the proclamation but sought its recission, and claim that the Mayor and others contacted Verizon to seek a revocation of the *eruv* agreement. (Chaim Book Cert. ¶ 30.) Plaintiffs did not adduce any evidence to support these allegations.

5. *September 14, 2000 Conversation*

On September 14, 2000, in an attempt to resolve the dispute, Mayor Moscovitz and Councilman Charles Lipson met with Rabbi Shmuel Goldin of Congregation Ahavas Torah in Englewood, New Jersey, and Joy Kurland, Director of the Jewish Community Relations Council. (Chaim Book Cert. ¶ 32; Rabbi Goldin Aff. ¶ 7.) While the occurrence of this meeting is undisputed, what was said is not.

According to Rabbi Goldin, he made it clear to those present that he was not acting as a representative of TEAI, and merely came as an interested member of the public who

was familiar with the concept of an *eruv*. (Rabbi Goldin Aff. ¶ 8.) After he had discussed the reasons for an *eruv* and the logic behind it, the Mayor expressed her concern about the symbolism of the Borough "renting the town". (*Id.* ¶¶ 9, 10.) Rabbi Goldin explained that the Bergen Proclamation did not have such a legal effect, and pressed the Mayor for what her real concerns were.[12] (*Id.*)

Allegedly, the Mayor said that her real concern was that she "didn't want them moving in." (*Id.* ¶ 11; Test. of Shmuel Goldin, May 1, 2001 ("Goldin Tr.") at 127:15-21.) Rabbi Goldin interpreted "them" to be Orthodox Jews. (*Id.*) The Mayor also expressed a concern that Orthodox Jews might throw stones at cars which passed on the Sabbath, or would block traffic on Saturdays by walking in the streets. (*Id.* ¶ 12.) She became quite emotional in describing the anti-Jewish discrimination she had experienced when she first moved to Tenafly, but expressed her pride that the Borough had evolved sufficiently to permit her to become its first Jewish Mayor. (*Id.* ¶ 13.) The mayor then allegedly expressed her concern that an influx of Orthodox Jews would jeopardize the acceptance and progress already achieved by the Jewish population in Tenafly. (*Id.* ¶ 14.)

Rabbi Goldin objected strongly to these alleged statements. It is undisputed that at one point he attempted to leave the meeting. (*Id.* ¶ 14.) Ms. Kurland and the Mayor prevailed upon him not to do so, and the meeting continued. (*Id.;* Moscovitz Tr. at 81:10-15.)

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12. During her testimony before the Court, the Mayor acknowledged that the Bergen Proclamation has absolutely no effect on civil law. (Test. of Ann A. Moscovitz, May 1, 2001 ("Moscovitz Tr.") at 77:7.)

Appendix B

According to the Mayor any perceived hurtful comments were not properly attributable to her, but instead to members of the public whom she was quoting. (Moscovitz Tr. at 77:17-25, 78:1-7.) The Mayor contends that Rabbi Goldin twisted her words and the opinions of others and threw them back at her in his affidavit. (Moscovitz Aff. ¶ 16.) While she did admittedly relate a story about how Orthodox Jews had thrown stones at her daughter while her daughter was horseback riding on the Sabbath, she related it merely as a point of fact. (*Id.;* Moscovitz Tr. at 80:21-23.) Councilman Lipson has also indicated that while Rabbi Goldin may have perceived some of the Mayor's comments to be offensive, he personally did not consider any of the Mayor's statements to be offensive. (Lipson Aff. ¶ 7; Test. of Charles M. Lipson, May 1, 2001 ("Lipson Tr.") at 20:16-24.)

Having heard live testimony from Mayor Moscovitz, Councilman Lipson, and Rabbi Goldin, the Court credits Rabbi Goldin's testimony, to the extent that he described his perceptions of the meeting with the Mayor and Councilman Lipson. It is uncontested that the Rabbi got up to leave the meeting, and that he did so after taking offense at statements that were made by the Mayor. While the Court does not reach the question of whether the Mayor intended to make comments that were offensive to Orthodox Jews, it is certainly apparent that to some degree she succeeded in doing so. That having been said, the Court does not believe the Mayor said she "didn't want them moving in" in light of her recorded statements in support of the *eruv* at the July 8, 1999 Work Session.

Plaintiffs contend that at the conclusion of the meeting a compromise was proposed, whereby the Borough would

"drop the matter" if the TEAI agreed not string any additional wires through the town, removed existing wires in the nature center, and limited placement of its *lechis* to the utility poles. (Chaim Book Cert. ¶ 34; Rabbi Goldin Aff. ¶¶ 16-20.) Defendants assert that no such agreement was reached. (Lipson Aff. ¶ 8.) Suffice it to say, nothing came of the negotiations, and no compromise was reached. (*See* Pls.' Ex. 17.)[13]

6. *October 31, 2000 Conversation*

On or about October 31, 2000, Charles Agus, a supporter of the *eruv* in Tenafly but not a named Plaintiff in this matter, contacted Mayor Moscovitz in hopes of opening a dialogue on the subject of the *eruv*. (Agus Cert. ¶ 4.) During this approximately hour-long conversation, he and the Mayor discussed the views of those community members who oppose the establishment of the *eruv*. (*Id.* ¶ 5; Moscovitz Aff. ¶ 19; Moscovitz Tr. at 91:1-101:6.)

According to Mr. Agus, during this conversation the Mayor implied that Teaneck's Orthodox Jewish population was responsible for the decline in Teaneck's public school system and responsible for the stores there closing on Saturday or going out of business. (Agus Cert. ¶¶ 6, 12; Agus Tr. at 115:6-116:13.) He claims the Mayor also implied that the establishment of an *eruv* in Tenafly might cause more

13. Borough of Tenafly Council member John Sullivan also engaged in discussions about possible alternatives to erecting the *eruv* on municipal property with Mr. Book and Mr. Jay Nelkin. Again, nothing came of these discussions. (*See* Test. of John Thomas Sullivan, May 8, 2001 ("Sullivan Tr.") at 18:11-20:1.)

Orthodox Jews to move to Tenafly, which would lead to the establishment of many small synagogues in Tenafly (the so-called "Spring Valley Phenomenon" so named after a town in New York with a large Orthodox population). (Agus Cert. ¶ 10; Agus Tr. at 116:2.) To support her assertion, the Mayor allegedly commented that a broker in Englewood had informed her forty families were waiting to move to Tenafly if an *eruv* were established. (Agus Cert. ¶ 11; Agus Tr. at 116:7.)

The Mayor denies Mr. Agus's allegations, and contends that she merely posed Mr. Agus a question, about what he thought the impact on the public schools would be if a large number of people moved to Tenafly and then withheld their children from the schools. (Moscovitz Aff. ¶ 19; Moscovitz Tr. at 95:14-15.) She also allegedly never said that the Businesses in Tenafly would be harmed, but instead said they would "change" and perhaps close on Saturdays. (Moscovitz Tr. at 98:10-11.)

Mr. Agus's impression of the conversation was that the Mayor had sincere concerns about the potential influx of Orthodox Jews, "was opposed to the *Eruv*, and . . . had serious concerns about the *Eruv's* future impact on the demographic makeup of the town." (*Id.* ¶¶ 14, 15.) Defendants counter that Mr. Agus misinterpreted the Mayor's words, and read into the conversation negative intent where there was none. Having heard both Mr. Agus and the Mayor testify regarding this matter, the Court credits Mr. Agus's testimony.

Appendix B

7. *Tenafly's Efforts to Remove the Eruv*

On September 26, 2000, at the request of the Mayor, the Borough Administrator contacted Cablevision to inquire about why they had aided in construction of the *eruv* without permission of the Borough. (DiGiacomo First Aff. ¶ 8.) He was allegedly informed that a Rabbi had represented to Cablevision that TEAI had obtained all of the necessary municipal permits. (*Id.*)

On October 10, 2000, at the direction of the Mayor and Council, Borough Administrator DiGiacomo wrote to Cablevision requesting that the *lechis* be removed from the poles as soon as possible. (*Id.* ¶ 8-9.) On October 23, 2000, Cablevision wrote to Plaintiffs and informed them that they had been asked by the Borough to remove the *eruv* material. (Chaim Book Cert. ¶ 39; 10/23/00 Letter from Cablevision to Pls., attached to Chaim Book Cert. as Ex. C.) In that letter, Cablevision stated in operative part:

> As you know, Cablevision agreed to assist you with the *Eruv* project in Tenafly as a community service in reliance upon your representation that you had obtained all authorizations necessary to place these plastic holders in the public right-of-ways. You provided us with copies of the pole licenses, but we have now been notified by the municipality that you never obtained the consent of the Borough for use of the public right-of-ways. As a result, Cablevision has been instructed by the municipality to immediately remove these plastic holders.

> Accordingly, this letter serves to notify you that, unless you can present us with a duly authorized right to use the municipal rights-of-way for the purpose of the *eruv*, Cablevision shall be compelled to honor the municipality's request and shall commence taking the holders down within three days of your receipt of this letter.
>
> We regret the position in which we find ourselves and hope you understand that Cablevision cannot afford to jeopardize its relationship with the Borough or its franchise to provide telecommunications services within the Borough.

(10/23/00 Letter from Cablevision to Pls., attached to Chaim Book Cert. as Ex. C.)[14]

After receiving the letter from Cablevision, counsel for Plaintiffs were able to come to an agreement with the Borough, which allowed the *eruv* to remain up for a period of thirty days so that TEAI could file an application with the Borough Council for permission to retain the *eruv* in place.

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14. Plaintiffs argue, based entirely on the third paragraph of the Cablevision letter, that Tenafly threatened Cablevision's franchise. While Mr. DiGiacomo admitted that he was asked to inform Cablevision that the *eruv* had been erected without permission, he flatly denied ever threatening their franchise. (DiGiacomo Tr. at 23:4-16.) In his defense, he claimed the Borough would have been unable to threaten their franchise, since the renewal process was tightly regulated by state law, and would not occur again until 2008. (*Id.* at 23:22-24:8.) The Court credits Mr. DiGiacomo's testimony, and concludes that aside from Plaintiffs' interpretation of the third paragraph of the letter, there is absolutely no evidence that the Borough of Tenafly threatened Cablevision's franchise.

(Chaim Book Cert. ¶ 41; DiGiacomo First Aff. ¶ 10.) This agreement was memorialized in a letter from Plaintiffs' counsel to the Borough Attorney. (11/2/00 Letter from Shapiro to Lesnevich, attached to Pls.' Ex. 14.) That letter reads in part:

> I also appreciate your advice that the Borough has no specific ordinance covering this matter or any particular format for the *Eruv* Association to follow in submitting its request. A written request will be promptly submitted.

(*Id.* at 2.)

In accordance with the agreement, an application was filed with the Borough on November 7, 2000. (Chaim Book Cert. ¶ 42; Appl. attached to Compl. as Ex. A.) This application did not seek a ceremonial proclamation or any other endorsement by the Borough of Tenafly; instead it only asked "the members of the Borough Council not to remove, or order the removal of, the '*Lechis*' on the utility poles in the Borough of Tenafly." (Compl. Ex. A at 2.)

To aid in the Borough's consideration of the request, on November 20, 2000 Estie and Charles Agus sent a packet of informational materials to the Council. These materials included their synagogue's vision statement (which explained their reasons for seeking an *eruv* in Tenafly) (Pls.' Ex. 15), a letter from the United Jewish Appeal asking that the *eruv* be permitted (Chaim Book Cert. Ex. B), a letter sent from President George H.W. Bush to a Jewish congregation in Washington, D.C. expressing support for their *eruv* (Chaim

Book Cert. Ex. A), and a list of responses to potential objections to the *eruv* (Pls.' Ex. 16).

8. *The November 21, 2000 Work Session*

At a work session on November 21, 2000, the Borough Council discussed how to proceed with TEAI's application. (*See* November 21, 2000 Borough of Tenafly Work Session Tr. ("11/21/00 Tr."), attached to Shapiro Second Suppl. Cert. as Ex. G.) After limited discussion, the Council agreed to hear TEAI's formal proposal at a public hearing to commence on November 28, 2000. (11/21/00 Tr. at 8.) Because it was known that Councilman Richard Wilson and Councilman Lipson would miss the November 28th hearing, the Council planned to begin the hearing on November 28th, and conclude it on December 12th, 2000. (*Id.*)

According to Borough Attorney Lesnevich, the application to the Borough Council was "not viewed as a sign application. It was viewed as a use of the right-of-way. That is why it went right to the Mayor and Council." (4/25/01 Tr. at 21:24-25, 22:1.) In the eyes of the Borough Attorney, Plaintiffs' request fell under Tenafly Ordinance 691, which prohibited the placement of any materials in the right-of-way.[15] (*Id.* at 22:5-23.) In his estimation, any

15. Borough of Tenafly Ordinance 691, which was enacted in 1954, provides in relevant part:

> No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.

(Cont'd)

contrary use would have to be approved by the Mayor and Council. Although Defendants also submitted a copy of Tenafly's sign ordinance to the Court, according to the Tenafly Borough Attorney the decision to deny TEAI's application was not made based on the provisions of that ordinance, but was instead based only on Tenafly Ordinance 691. (*Id.* at 24:6-21.)

9. *The November 28, 2000 and December 12, 2000 Public Hearings*

At the two hearings on November 28 and December 12, 2000, fifty-four members of the public rose to speak on the *eruv* matter. A handful of these individuals spoke at both hearings. Of the total, approximately twenty-six spoke in favor of the *eruv,* and twenty-five spoke against it. The remainder made either neutral comments or asked rhetorical questions of the crowd.

Borough Attorney Lesnevich imposed ground rules for the hearings, whereby dialogue between members of the

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(Cont'd)

(Tenafly Ordinance 691 Article VIII(7).) While the Ordinance is absolute on its face and does not provide for legislative determinations of whether uses not contemplated by an Ordinance may be permitted, at least one member of the Council was operating under the perception that it did. According to Borough of Tenafly Council member Arthur Peck, he was under the impression that for the placement of anything in the Borough's right-of-way, an ordinance required that an application be made to the Borough, that a hearing be held, and that a vote be taken by the Mayor and Council. (Test. of Arthur Peck, April 30, 2001 ("Peck Tr.") at 95:10-13.)

public and the Council was not permitted. (November 28, 2000 Borough of Tenafly Public Hearing Tr. ("11/28/00 Tr."), attached to Shapiro Cert. as Ex. B, at 13:12-23.) Council members were instructed not to respond to questions, since the hearing was viewed as an opportunity for them to listen to what the public had to say. (*Id.*)

At both hearings Chaim Book, spokesman for TEAI, was afforded the opportunity to frame Plaintiffs' request to the Council. (11/28/00 Tr. at 13:6-7; December 12, 2000 Borough of Tenafly Public Hearing Tr. ("12/12/00 Tr."), attached to Shapiro Cert. as Ex. C, at 16:13-20:10.) At the November 28, 2000 hearing, after initially apologizing for the manner in which the *eruv* came to the community's attention, he explained in great detail what had drawn him to Tenafly, what an *eruv* was, and why he felt it would be beneficial to have an *eruv* in Tenafly. (11/28/00 Tr. at 14:10-34:10.) He also explained how it was an *eruv* had come to exist on the Borough's utility poles, despite the absence of Borough permission for it. (*Id.*) Lastly, he discussed the case of *ACLU of New Jersey v. City of Long Branch,* 670 F. Supp. 1293 (D.N.J. 1987), which held that *eruvs* may be permitted by a municipality without fear of violating the Establishment Clause. (12/12/00 Tr. at 32:14-33:21.)

After Mr. Book's introductory statement, the remainder of the November 28, 2000 hearing was comprised of an even mix of commentary both for and against the *eruv.* While one member of the public commented that "the hate and the bitterness in th[e] room [was] overwhelming," (11/28/00 Tr. at 81:6-7), the next speaker took issue with that statement, and said "I kind of resent the idea . . . that there's a palpable

hatred and bitterness that's exhibited. I think there's a disagreement, no question about that, but I don't equate disagreement with hatred and bitterness." (*Id.* at 81:21-82:4.)

Having had an opportunity to listen to the audio tape of the hearing, the Court finds that the second comment is a fairer assessment of the November 28, 2000 hearing. Although comments at the November 28th hearing occasionally mimicked the statements that were made at the first hearing in July of 1999, far more *eruv* supporters were present to make their case at the November 28, 2000 hearing.

The statements made in opposition to the *eruv* at the November 28th hearing highlighted the major themes that run through this dispute. Residents were concerned that the *eruv* had been erected without permission, might violate the separation between church and state, would cause the Borough to lose control of its right-of-way, would lead to the formation of an insular "community within a community," would be divisive and destructive to Tenafly, and was unnecessary given the self-imposed religious restrictions it was designed to alleviate.

By way of example, residents felt that Tenafly should not favor one particular religious group. (11/28/00 Tr. at 38:23-39:21.) Others took issue with the fact that the Borough Council had been circumvented when Bergen County was contacted for issuance of the ceremonial proclamation, and that this proclamation had been used to secure permission from Verizon and Cablevision to hang the *eruv* without the Borough's permission. (*Id.* at 41:7-11.) It was also noted that it is not the place of the Borough to be involved in religion. (*Id.* at 79:7-10.)

Appendix B

There was also the oft repeated concern that just because *Long Branch* permitted a town to have an *eruv,* the decision did not require a town to do so, and that in a small, diverse town such as Tenafly an *eruv's* "artificial contrivance to get around Orthodox Judaic religious laws" would set a terrible precedent for future actions by the town. (*Id.* at 42:1-20.) It was opined that letting any one group have such religious access to the right-of-way would make it impossible to differentiate between requests in the future, or establish a precedent that could not later be undone. (*Id.* at 44:19-22, 70:18-22, 73:2-5.) Others took issue with the erection of a permanent structure on public property to aid a religious group in calling the Borough their private domain. (*Id.* at 61:17-20.) Residents commented that they were opposed to the creation of a "community within a community," because of the perceived attendant social evils that would result. (*Id.* at 77:15-19.) As one resident said, "I do not want to live in someone else's domain, also known as a ghetto." (*Id.* at 77:21-23.)

Some residents felt that the *eruv* was "like a hostile take-over" of the community, in which the Borough should not assist. (*Id.* at 44:17-18.) Others thought it would lead to a demise of the public schools, which the Borough should not facilitate. (*Id.* at 47:1-9.) It was also expressed that residents liked the town the way it is, and did not want to visit the change wrought by an *eruv* upon it. (*Id.* at 52:10-12.)

It was also questioned why the town should give up a portion of its right-of-way to help ease restrictions that a religion had imposed upon itself. (*Id.* at 60:21-23.) Still others pointed out that the *eruv* supporters were limited by their

faith itself, and that the town was not responsible for their burden. (*Id.* at 64:24-65:7.) If they wanted to, they could live in a town that had decided to accommodate them, as opposed to forcing accommodation upon Tenafly. (*Id.*) One seemed to frame the proponents' view clearly when he said "it would seem to me that if the opportunity arises for the town to offer me a convenience which I appreciate, which others appreciate, which is not at the detriment" of anyone else, the town should do so. (*Id.* at 76:9-17.)

In the face of this harsh criticism, many citizens were strongly in favor of the *eruv.* It was felt by some that the speakers against the *eruv* simply wanted to keep an influx of Orthodox Jews out of Tenafly. (*Id.* at 80:15-17.) Some saw the *eruv* as a harmless measure to increase diversity, the denial of which would inevitably and unfortunately lead to litigation. (*Id.* at 45:18-23.) Others felt it was a reasonable accommodation, which would increase diversity or improve their quality of life. (*Id.* at 48:1-2, 51:6-11, 64:1-14.) Some speakers sought to dispel the misconception that an *eruv* would lead to stores closing on Saturday or to a demise of the public schools. (*Id.* at 56:11-57:13.) Others pointed out that it was not an infringement on any other residents of Tenafly, and that it was a concession to religious freedom that would harm no one. (*Id.* at 63:17-19, 71:15-23.) It was also noted that doing something which would make more affluent people want to live in Tenafly would be good for the town, since it would improve the real estate market. (*Id.* at 69:10-14.) Finally, there was an Englewood resident who spoke on behalf of the *eruv,* not because he wished to move to Tenafly, but because an *eruv* would make it easier for him to walk into Tenafly to see his friends on the Sabbath. (*Id.* at 100:13-23.)

Appendix B

Some residents did not speak out for or against the *eruv,* but instead asked questions they hoped might be answered, or sought to make neutral points. For instance, one resident asked how long the proponents of the *eruv* had lived in Tenafly, and wanted to know how they had gotten along without an *eruv.* (*Id.* at 52:21-53:2.) Another commented that if the matter were so important, it should be put on the ballot for a public vote. (*Id.* at 62:11-14.)

The December 12, 2000 hearing was in many respects identical to the one that took place on November 28, 2000. Mr. Book was given a chance to make introductory remarks, and closing remarks. (12/12/00 Tr. at 16:13-20:10.) The largest distinction at this hearing was that in addition to members of the public, members of various organizations were also present. This included the leaders of several local Christian churches.

Mr. Book had invited Rabbi Howard Jachter, of the Torah Academy of Bergen County, to speak to the group in greater detail about the nature of an *eruv,* and what impact it might have on the community. (12/12/00 Tr. at 20:24-34:1.) Rabbi Jachter also gave a history of the *eruv* movement in the United States (which began in the 1970's), and discussed many of the places in the United States that had *eruvs.* (*Id.*) He noted that in Washington D.C., even the Supreme Court of the United States sits within an *eruv.* (*Id.* at 27:3-4.) Most importantly, he tried to dispel some of the perceived misconceptions that existed about the nature of the religious domain created by the *eruv.* (*Id.* at 30:11-31:22.)

The Regional Director of the Anti Defamation League also spoke, and noted that while he would not want any

religious symbol permanently placed on public property, the *eruv* was not a religious symbol but instead a reasonable accommodation of religion. (*Id.* at 43:17-22, 44:1-4.) He reiterated the precedent of *Long Branch* and concluded that it "is a secular accommodation for people to engage in secular activities, not religious activities." (*Id.* at 45:5-7.)

The comments made by the public at the second hearing were similar to those made on November 28th. For example, there was fear that approving the *eruv* would result in a pandora's box effect, whereby the town would have to grant all private religious requests to use public property. (*Id.* at 35:24-25.) Others pointed out that it would not be anti-Semitic to vote against the *eruv,* but would instead be a political decision about property rights. (*Id.* at 38:1-3.) One noted that the radical change that the *eruv* would bring would tarnish the community of Tenafly that all had enjoyed. (*Id.* at 51:9-15.) Another statement was made to the effect that it was the all-encompassing nature of the *eruv* that many persons, including secular Jews, found antithetical to Jewish heritage. (*Id.* at 90:14-18.) It was noted that the *eruv* "is a thorn in the side of the community of Tenafly and I think it will become a festering wound in the community of Tenafly." (*Id.* at 108:14-17.) One resident commented, "I hope your Mayor and your Council have the courage" to vote against the small group of people who sought to install an *eruv* and ruin the community." (*Id.* at 79:14-18.)

There were also numerous individuals at the second hearing who spoke out in favor of an *eruv* in Tenafly. For example, one noted that "surely, a town that brandished orange ribbons tied to almost every pole in town for what I

think was several years can tolerate some unobtrusive markers that facilitate a better life for a segment of the community." (*Id.* at 52:11-16.) Another said, "I can see no downside to the erection of the *Eruv* at all. I do see that the Tenafly *Eruv* Association made a grave faux pas in attempting to erect the *Eruv* without permission." (*Id.* at 86:4-7.)

At the conclusion of the December 12, 2000 hearing, Mr. Book was again given the opportunity to make closing remarks. During these remarks, he again extolled the virtue of an *eruv,* and its importance to those who believed in it. (*Id.* at 110:23-119:3.) He also again mentioned an *eruv's* permissibility under the Establishment Clause, by commenting on *ACLU v. Long Branch.*

At the conclusion of the December 12, 2000 hearing, the Tenafly Borough Council voted 5-0 to deny TEAI's application. (Chaim Book Cert. ¶ 47; 12/12/00 Tr. at 126: 4-15.) There was no written resolution memorializing the decision. Council Member Christian Yegen was not present,[16] and Mayor Moscovitz did not vote.[17] (*Id.*) Only Council members Kerge and Sullivan made any statements on the record regarding why they had voted as they did. (*See* Section I(D) of this Opinion, *infra.*)

16. Councilman Yegen was present at the first hearing, but not at the second and did not vote. Council members Lipson and Wilson were absent from the first hearing but, after reviewing the tapes and transcripts, attended the second hearing and voted on the proposal to remove the *eruv.*

17. Tenafly has a weak Mayor and Council form of government, whereby the Mayor generally only votes in the case of a tie. (Moscovitz Tr. at 70:2-5.)

The following day, December 13, 2000, the Borough, via a letter sent by its Counsel, ordered that Cablevision take action to remove the *eruv* material as soon as possible. (12/13/00 Letter from the Borough to Cablevision, Pls.' Ex. 13.) The Mayor also called Cablevision on December 13, 2000 and directly asked that the *Lechis* be removed as soon as possible. (Moscovitz Tr. at 103:19.)

This litigation commenced on December 15, 2000. Pursuant to the Court's temporary restraint entered that day and a series of consent orders extending it, the *eruv* has remained up pending resolution of this application for a preliminary injunction.[18]

D. *The Borough Council's Grounds for Denying the Eruv Application*

Because only Councilman Sullivan (and to a much lesser extent Councilwoman Kerge) expressed any rationale for the Council's denial of the *eruv* at the December 12, 2000 hearing, the Court must rely primarily on statements made by the Council in their affidavits and during their testimony before the Court. To a lesser extent, statements made by some of the Council members at the two work sessions shed some light on the object of their decisions. Although she did not vote, because the Mayor was an active participant in the events surrounding the Borough's denial of the *eruv*

18. The *eruv* was down briefly during the pendency of this litigation because of acts of vandalism. The Court finds that the town responded properly to those acts of vandalism (by ordering heightened police patrols of the *eruv*), and has acted appropriately to ensure that such vandalism does not recur.

application, her expressed opinions on the *eruv* application are set forth here.

During their testimony before the Court, all of the Council members testified that they were not influenced by anti-Semitism or anti-Orthodox sentiments when they voted against the *eruv* application. (Wilson Tr. 62:20-63:1; Peck Tr. 90:19-23; Lipson Tr. 7:7-11; Kerge Tr. 41:20-24; Sullivan Tr. 6:2-6.) Beyond that common ground, all of the Defendants articulated somewhat differing reasons for their denial of the *eruv* application.

1. *Councilman Charles Lipson*

Councilman Lipson expressed four separate concerns that led to his denial of the application for the *eruv*. First, echoing what is a popular theme among some Council members, he believes that the construction of an *eruv* would create a "community within a community." (Lipson Aff. ¶ 9.) He believes that the *eruv* would establish a separation within the town of Tenafly, between those who are within the *eruv* and those who are outside of it. (Lipson Tr. at 23: 20- 24.) This would be very disruptive for the town. (Lipson Aff. ¶ 10.) Further, Councilman Lipson believes that the anger and strife within a town that a "community within a community" would create is evident from the tone of the papers filed in this case. (*Id.*)

The second concern voiced by Councilman Lipson had to do with control of the Borough's right-of-way. In his mind, although many religious groups could find a use of the Tenafly right-of-way for their purposes, Tenafly strictly limits

use of the right-of-way. (*Id.* ¶ 11.) Exceptions to the no-use policy are only allowed after a detailed application is made to the Council, and after a determination is made that the exception would be "good for the town." (*Id.*) The Councilman is concerned that if an *eruv* is permitted, the town will not be able to say no to future requests by other private actors for both religious and non-religious use of the right-of-way. (*Id.*) In effect, he did not want to set a precedent that would cause the town to lose control of the right-of-way. (*Id.*)

Mr. Lipson's third concern had to do with his obligation to Tenafly and to his constituents. Despite the many "obnoxious" statements that were made by the public against the *eruv,* what affected the Councilman most came from within:

> [w]hat affected me most is my own experience and knowledge and my understanding of the Borough of Tenafly, the way it is and the way I want it to be. I believe that in voting against the *eruv* I was doing what I was elected to do: be concerned with the best interests of the residents of the Borough, all of them, and, in addition, voting my conscience. I stand by my vote.

(Lipson Aff. ¶ 11.)

The fourth concern held by the Councilman, which he expressed only during his testimony before this Court, was that the *eruv* should be denied because it had been erected illegally. He reached this conclusion even though he was

aware that his decision would have an impact on whether *eruv*-observant Jews would move to Tenafly. (Lipson Tr. at 24:5-23, 28:5-10.)

2. *Councilwoman Martha Kerge*

As an initial matter, Ms. Kerge was quite concerned about letting the public express their opinions on the *eruv*. At the November 21, 2000 work session, when it became necessary to schedule the meeting for two days because of Council attendance problems, she stated that "if it's a continuation they can still speak again. We can not bridle the voice of the public." (11/21/00 Tr. at 11.) In keeping with this, Ms. Kerge spoke to many citizens and heard from many people with strong feelings on both sides of the *eruv* issue. (Kerge Aff. ¶ 6.) Prior to her vote on December 12, 2000, she again expressed the importance of considering all points of view, and stated that she was voting as she did because based on all she had heard and read, it would be in the best interest of Tenafly to deny the *eruv*. (12/12/00 Tr. at 120:25-121:13.)

The Councilwoman's primary objection to the *eruv* seemed to stem from a desire to avoid an entanglement with religion, while simultaneously rejecting a request she deemed unnecessary. After noting Plaintiffs' constitutional right to practice their religion, and the welcoming nature of Tenafly to all people and faiths, she stated:

> [i]t is my belief that all the different religions do worship freely and practice their religion freely. It is my further understanding that Orthodox congregations can and do practice their religion

> freely without the accommodation of an *eruv* and that a town may establish an *eruv* or may deny an *eruv*. No one ever told me a town must establish an *eruv*.

(Kerge Aff. ¶ 7.)

While Ms. Kerge did concede that *eruv* supporters would like to have an *eruv*, she did not think it was required for them to practice their faith. (Test. of Martha B. Kerge, May 1, 2001 ("Kerge Tr.") at 49:20-23.) Councilwoman Kerge viewed an *eruv* as an accommodation, the absence of which did not hinder the free practice of religion by Orthodox Jews. (Kerge Aff. ¶ 8.) Essentially, Ms. Kerge felt the government is typically not required to create a special accommodation for the practice of religion by a specific religious sect, and that the *eruv* falls into that category. (*Id.* ¶ 13.) She believed the Tenafly Orthodox community would continue to thrive without an *eruv*. (*Id.* ¶ 14.) She pointed to the Orthodox Jews who currently live in Tenafly without an *eruv* to support the proposition that an *eruv* is not essential, and is instead only an accommodation. (Kerge Tr. at 57:14-20.)

Since she did not view the *eruv* as a required accommodation, Ms. Kerge wanted to avoid specially benefitting any group, and impinging on the rights of others. (Kerge Aff. ¶ 12.) These concerns of impinging the right of others arose with concerns about not being able to opt out of the *eruv*. On this point, she said, "I believe that this accommodation would affect the rights of those who do not want to live within an *eruv*. I do not want to vote to establish

something that makes people within an *eruv* feel awkward or put upon by a symbol of a religious group." (*Id.*)

In passing, Councilwoman Kerge expressed the same concern about building a "community within a community" that was expressed by Councilman Lipson. She believed such a community poses serious questions for Tenafly. (*Id.* ¶ 9.) She also implied that the *eruv* might be divisive when she described the *eruv's* symbolic meaning. She noted that while the *eruv* has symbolic meaning which might not apply to one person, it could apply either positively or negatively to the rest of the people in Tenafly. (Kerge Tr. at 62:10-13.)

Ms. Kerge also expressed brief concerns about an *eruv's* impact on Tenafly's control of its right-of-way. She felt that given the strictures imposed upon the Tenafly right-of-way, which limit even for-sale signs, "the right-of-way should remain free of encumbrances. They should not be used for symbolic or religious or accommodation purposes for any group." (*Id.* ¶ 11.)

3. *Councilman Richard Wilson*

Councilman Wilson had two distinct concerns about the *eruv.* First, he found the permanent nature of the *eruv* to be its most ominous aspect. (Wilson Aff. ¶ 7.) He was of the belief that the permanent *eruv* is in sharp contrast to other religious symbols which exist in Tenafly (such as the Menorah in Borough Park), which are temporarily erected on Borough property during the holidays. (*Id.*) Similar to the concern of Councilman Lipson, Mr. Wilson felt that the permanence of the *eruv* might make it impossible for the

Borough to reverse its decision in the future, if the *eruv* were allowed. (*Id.*) He did not wish to permit a religious symbol of a "permanent" nature in the public right-of-way. (Test. of Richard V. Wilson, April 30, 2001 ("Wilson Tr.") at 84:10-12.)

The second concern expressed by the Councilman was that after giving "due consideration" to the various points presented, based on his own knowledge of medieval history, he believed an *eruv* would lead to the creation of a "ghetto" in Tenafly. (Wilson Aff. ¶¶ 2-4; Wilson Tr. at 69:25.) Avoiding the creation of the ghetto formed a basis for his vote. (Wilson Tr. at 70:3.)

Essentially, "the community of Tenafly would be at great risk and would encourage the creation of what has become in recent history a symbol of the restriction of religious freedom if an *eruv* is erected." (Wilson Aff. ¶ 5.) He had been told that the "risk" and "restriction" came from demarcating an area symbolically within which non-Orthodox Jews might feel less Jewish or feel like "the wrong type of Jewish person." (Wilson Tr. at 87:20-88:3.) Councilman Wilson took this sentiment into consideration when voting. (Wilson Tr. at 88:4- 5.) In further explaining what he meant by a "ghetto," Councilman Wilson stated that this restriction leads to everyone in a particular neighborhood being of an Orthodox sect, which is generally considered the definition of a "ghetto." (Wilson Tr. at 88:5-9.)

Another part of this anti-ghetto motivation stemmed from a desire to avoid what had happened in other areas:

> [W]e find . . . in modern times that when you create a neighborhood through the use of this

> religious symbol, however its physical characteristics may be, there is a tendency over the years to then have only people of that particular Orthodox Jewish faith to live in that neighborhood.

(Wilson Tr. at 78:11-22.)

Councilman Wilson's fear was that "an *eruv* in Tenafly would be divisive and detrimental to the town." (Wilson Aff. ¶ 9.) In order to keep this from happening, he stated "I believe that, in my role as Council member, I should vote for what I believe is in the best interest of the Borough of Tenafly and that is why I voted against the application." (*Id.*)

Even though Mr. Wilson believed an *eruv* to be divisive, he acknowledged that since its erection it has not interfered with his daily living or his practice of religion at all. (Wilson Tr. at 65:21, 66:4.) He further commented that the divisiveness of an *eruv* would be most apparent between Orthodox and Reform Jews, and that Christians would be less affected. (Wilson Tr. at 88:24-89:8.) He held this opinion because in his mind, an *eruv* has very restrictive religious symbolism to those Jewish residents of Tenafly who do not believe that it allows them to push and carry on the Sabbath. (Wilson Tr. at 68:16-25.) He believes that to those Jews, the *eruv* designates or restricts an area only for the use of the Orthodox community's Sabbath. (*Id.*) He also understands that it implies to those Jews that they are somehow not truly Jewish. (Wilson Tr. at 69:8-12.)

Appendix B

4. *Councilman Arthur Peck*

Councilman Peck expressed several reasons for voting against the *eruv* application. *167 First, he felt that it was unacceptable to have an *eruv* which had been erected without permission on poles in the Borough's right-of-way. (Peck Aff. ¶ 2.) In his words, to allow the *eruv* to remain and "[t]o fail to enforce local law would be to violate the oath Tenafly officials take when sworn into office." (*Id.*) Concerned that permanent use of public property for a religious purpose would establish a precedent for such use in the future, he voted to deny the *eruv.* (*Id.* ¶ 3.)

Mr. Peck also had apparent state establishment of religion concerns: he wanted a decision that would serve to avoid having to chose between competing religious requests in the future. (*Id.)* He also wished in part to avoid the appearance of an establishment clause violation, since civil authority permission for the *eruv* might represent an entanglement of church and state. (*Id.* ¶ 4; Peck Tr. at 100:19-23.)

A final argument raised by the Councilman seemed to be that the *eruv* is not a necessary religious accommodation. He reasoned that because local Orthodox Jews had lived in the town for five years and had never requested an *eruv,* it is likely not required for their faith now. (*Id.* ¶ 5.) Tied to this was his concern that since most *eruv* supporters live outside Tenafly, he had no major obligation to consider their requests, but instead had an obligation to his residents (presumably those who opposed it). (*Id.* ¶ 6.)

It seemed to Mr. Peck that the residents in Tenafly who now sought an *eruv* were already practicing their religion

without an *eruv*. (Peck Tr. at 104:24- 25.) Because they knew Tenafly did not have an *eruv* when they moved, and because they remained residents in Tenafly without it, denying permission for an *eruv* would not impact on an existing situation. (*Id.* at 105:3-7.) Denial of *eruv* would mean only that they would continue to live in Tenafly without the benefits an *eruv* would provide. (*Id.* at 105:15-17.) Given the many surrounding communities that had *eruvs*, including neighboring Englewood, and that the supporters of an *eruv* could live in Englewood if they wanted, it did not seem to Councilman Peck that the impact of denying the *eruv* would be particularly severe. (*Id.* at 106:10-17.)

5. *Councilman John Sullivan*

Unlike the other Council members, Mr. Sullivan repeatedly expressed his views on the *eruv* during the public meetings that took place prior to the vote. At the November 21, 2000 work session, he commented that while he felt the members of the *eruv* association he had met should be welcomed into the Tenafly community, he was troubled by their request to "make the walls of Jerusalem tangible." (11/21/00 Tr. at 4.) By way of comparison, Councilman Sullivan also mentioned how troubling it would be if the town were dedicated to St. Francis of Assisi in the name of nature and peace, and demarcated with green and white streamers. (*Id.*) He felt that such conduct, which was similar to the *eruv*, would be advancing one person's religious beliefs ahead of another's. (*Id.*) He also implied that Plaintiffs were an "outside pressure group" who had come to Tenafly and were now trying to tell the town how to conduct its affairs. (*Id.* at 4-5.)

Appendix B

Shortly before the vote on December 12, 2000, Councilman Sullivan also made a number of comments on the record as to why he was about to vote against the *eruv*. (12/12/00 Tr. at 121:21-125:6.) Essentially, his concern was that private use would be made of the Borough right-of-way by a religious group, which could lead to undesirable precedent if future groups made similar requests. (*Id.*) He was also troubled that an *eruv* would establish a private domain on public land, from which no one could opt out. (*Id.*)

These concerns are repeated in the statements made by Mr. Sullivan after the vote. According to the Councilman, he concluded from his review of scholarly works that since an *eruv* designates the public domain as a religious extension of the home's private domain, the creation of one in Tenafly would contravene the rights of Tenafly's residents to free association without religious and governmental interference. (Sullivan Aff. ¶ 4.) This entanglement/endorsement issue seemed to be central to Councilman Sullivan. His vote took into account the fact that there was no opt-out procedure for citizens whose homes were within the "religious domain" of the *eruv*. (*Id.* ¶ 6.) Similarly, He did not think it was appropriate that the *eruv* would be established in a way that would involve both the government and a religious entity, and thought the Borough should stay clear of the issue. (Sullivan Tr. at 9:16-23.)

The last establishment-related reason for his vote against the *eruv* was a concern about his constituents' interests. Noting that Tenafly is an ecumenical town, Mr. Sullivan "believe[s] that we as citizens can help each other rather than

permit government to dictate how we practice religion through fiat." (*Id.* ¶ 8.) He felt that by permitting an *eruv,* he might be interfering with his constituents who were opposed to the *eruv.* (Sullivan Tr. at 11:11-13.) Accordingly, he wished to avoid creation of a private, religious domain within the public domain. (*Id.* at 14:1-6.) He felt he had to represent his constituents who had objected to it, as well as members of the *Eruv* Association. (*Id.* at 24:11-13.) Councilman Sullivan did concede that the absence of an *eruv* would adversely impact the lives of those who believed in it. (*Id.* at 16:24.)

Distinct from his Establishment Clause concerns, Councilman Sullivan's decision was also influenced by TEAI's failure to find harmony and compromising by seeking to establish an *eruv* with natural boundaries. (Sullivan Aff. ¶ 7.) While he would not have been opposed to such an *eruv,* he had a problem with any *eruv* created on municipal property. (Sullivan Tr. at 22:7-23:10.)

6. *Mayor Ann Moscovitz*

Mayor Moscovitz's primary concern with the *eruv* was "a constitutional one, a legal one, and that is that municipal property is not to be used for any private or religious purpose of a permanent nature." (Moscovitz Tr. at 71:1-3.) The Mayor stated that in her position as Mayor, she attempts to "do what I think is best for the people of Tenafly." (Moscovitz Aff. ¶ 21.) With that guidance in mind, she has expressed an intention to continue to follow her oath of office and do what she thinks is best for Tenafly regardless of her personal religious beliefs. (*Id.* ¶ 22.) She refused to succumb to

pressure to accommodate her fellow Jews on the basis of religion alone. "Because we are Jewish, they assume, and seem to demand, that we set aside our thought process in coming to a decision about what is best for the town, and that we should do what they want just because we are Jewish." (*Id.*) That having been said, she "listened to a lot of bad things" at the public hearings, and did not necessarily agree with everything that was said. (Moscovitz Tr. at 95:24-25.)

E. *The Borough's Control of its Right-of-Way*

While the utility poles Plaintiffs sought access to are owned by Verizon and not the Borough, they reside in the Borough's right-of-way. (DiGiacomo Tr. at 48:10-14.) As such, the "municipal poles are on town property and municipal approval is necessary." (Moscovitz Aff. ¶ 18.) It is undisputed that the Borough's control of the poles comes not from ownership of them, but instead from the poles' location in the municipal right- of-way. (*See, e.g.*, Tenafly Ordinance No. 1127.)

That the Borough relies on its ownership of the right-of-way to control uses within the right-of-way is further demonstrated by a "Right of Way Use Agreement," entered into between the Borough and Metricom, a wireless telecommunications provider. (Agreement attached to Shapiro First Suppl. Cert. as Ex. A.) That agreement grants Metricom the right to enter the right-of-way to attach its telecommunications devices onto third-party property (namely the poles), but restricts any placement on third-party property to those placements which are expressly permitted by the owner(s) of the affected property. (*Id.* at § 3.1.)

Appendix B

The Borough of Tenafly claims that it tightly regulates all private use of its public right-of-way, including its utility poles, by local ordinances. (DiGiacomo Tr. at 17:14-22.) This control is demonstrated in part by the previously detailed Ordinance 691, and by a sign ordinance, which prohibits the posting of all signage on utility poles. (*Id.* at 17:20-22.) Tenafly further controls the right-of-way via a garage sale ordinance, which requires residents to use town supplied signs, and restricts the placement of the signs to private property. (Ordinance attached to DiGiacomo Second Aff. as Ex. A.)

Not all uses of the right-of-way are banned. The Borough has stipulated that it has not denied an application to place a sprinkler system in the public right-of-way for at least fourteen years. (DiGiacomo Tr. at 43:18.) The Borough has also allowed assorted variances for walls, light-posts, and fences. (*e.g.* Pls.' Exs. 3, 8-11.)

Unlike those landscaping applications, however, there have been "many" denials of applications to place signs in the right-of-way. (4/30/01 Tr. at 44:45.) While signs are occasionally permitted to be placed in the public right-of-way, they are allowed only after application is made to the Borough and only in accordance with the sign ordinance. (*See, e.g.*, Pls.' Ex. 7 (Tenafly Agreement with the Villa Cortina, allowing commercial sign to be placed in right-of-way for $1.00).)

Even though the Borough claims to have a strictly enforced no-private-use policy for its right-of-way, Plaintiffs argue to the contrary. To support the contention that Tenafly

does not tightly control its right-of-way, Plaintiffs submitted pictures of assorted privately posted signs and numbers (signs such as house numbers, lost dog notices, etc.) on utility poles. (Pls.' Exs. 21-31.) The Borough allegedly responded to those pictures by making a concerted effort to have the signs removed from the poles. (DiGiacomo Tr. at 48:23-50:13.) Plaintiffs contend that Defendants' effort was not in fact thorough, since after the Borough made its effort to remove the signs, a number of the same signs shown in the exhibits remained on the poles.

In addition to the non-permitted uses which the town seeks to bar, there are a handful of private uses of the right-of-way which the town permits, even though they are not contemplated by ordinance. First, Plaintiffs photographed at least five privately placed church directional signs, two of which are in the Borough right-of-way. (Nelkin Aff. ¶ 3; DiGiacomo Tr. at 28:20-29:2; DiGiacomo Second Aff. ¶ 6.) The remainder are in the county right- of-way. (DiGiacomo Third Aff. ¶ 2.) Some of these church directional signs contain religious symbols. (DiGiacomo Tr. at 29:7.) Although no application was made for these signs, the Borough tacitly permitted their existence *170 in the right-of-way. (*Id.*) Even absent a provision in the Borough ordinances allowing these signs, the Borough permitted them to remain because they served the purpose of providing motorists with directions to the religious institutions that had placed the signs. (*Id.* at 29:8-16; DiGiacomo Second Aff. ¶ 6.)

While Defendants initially contested that the signs photographed by Plaintiffs were located in the municipal right-of-way, and were instead located along county roads

(thus placing them in the county right-of-way), Defendants admit that at least two of the signs are in the Borough right-of-way. (DiGiacomo Third Aff. ¶ 2.) One such directional sign, attached to a traffic sign, is located in the municipal right-of-way at the northwest corner of Engle Street and East Clinton Avenue in Tenafly. (*Id.* ¶ 2(b).) This sign, shown in the photograph attached to Borough Administrator DiGiacomo's third affidavit as Exhibit B, reads "Greek Orthodox Church <— 1 Mile," and contains the image of a stylized Greek Orthodox cross. The sign is mounted on the same pole as a municipal directional sign, which graphically illustrates "left lane—left turn only; right lane—right turn or straight." (*Id.*)

The other church directional sign now before the Court which is located in the Borough right-of-way is located on Engle Street, at the intersection with Hillside Avenue. (DiGiacomo Third Aff. ¶ 2(c).) This sign, shown in the photograph attached to DiGiacomo's third affidavit as Exhibit C, reads "Presbyterian Church (USA) 2 Blocks <—," and also contains a stylized cross. (*Id.*)

After a review of the directional signs mentioned above, (both those on municipal property and those on County property within Tenafly), the Mayor and Council ordered that the Borough Attorney contact the churches responsible for the signs. (5/24/01 Letter from Lesnevich to the Court.) The churches were informed that any signs which contained religious symbols or hours of religious services would need to be removed. (*Id.*) The churches were permitted to replace the signs with purely directional markers, that contained only the name of the house of worship and directional information.

(*Id.*) As of July 18, 2001 however, the original signs were still standing in the right-of-way, apparently unchanged. (*See* Nelkin Suppl. Aff. ¶ 3.)

Plaintiffs also presented another use of the municipal right-of-way which is not permitted by Ordinance, but is allowed to continue by the Borough Council. Specifically, each year holiday displays are placed on utility poles by the Tenafly Chamber of Commerce. (*See, e.g.*, Nelkin Aff. Ex. B.) These holiday displays consist of a wreath, garland, light fixture, and seasonal holiday lights. (*Id.*) The Court has attached a photograph of these holiday displays to this Opinion as Appendix C. According to Borough Administrator DiGiacomo:

> The holiday decorations placed on utility poles are paid for by local businesses. This is done through the Chamber of Commerce. The purpose is to promote a shopping atmosphere in downtown during the holiday season. They remain in place for approximately six weeks. They are intended to be nondenominational and are certainly nonreligious. They are intended to convey a wintry holiday theme and nothing else.

(DiGiacomo Second Aff. ¶ 4.)

After a review of all the evidence submitted which bears on Tenafly's right-of-way, notwithstanding the holiday displays and the pair of church directional signs in the Borough right-of-way, the Court finds that the Borough did have a policy of controlling access to its utility poles and

municipal rights-of-way, generally allowing access only in those circumstances where a use was permitted under a municipal ordinance.[19]

II. DISCUSSION

Since a motion for a preliminary injunction cannot be granted unless the movant demonstrates a reasonable likelihood of success on the merits, *see Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000), it is the merits that demand immediate attention. Plaintiffs argue that the decision of the Borough Council to deny permission to attach the *lechis* to the utility poles violated their rights under the First Amendment to the Constitution, as applied to the states through the Fourteenth Amendment of the Constitution. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Specifically, they argue that the Borough Council intentionally discriminated against the Free Exercise of their religion, and furthermore violated their Right to Free Expression by engaging in viewpoint discrimination when it denied their application on the basis of the *eruv's* symbolic message.[20]

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19. Limited references were made at the public hearings and in argument before the Court to orange ribbons which at some point in the past were tied around trees and utility poles in Tenafly to symbolize community solidarity against regionalization of the public school system. The Court does not have before it sufficient evidence to include them in its analysis, since it has not been made aware of how prevalent these ribbons were, where exactly they were located, how long they remained in place, whether the Borough Council was aware of them, or what efforts (if any) were made to remove them.

20. The Court notes that Plaintiffs' Complaint does not assert a violation of the Equal Protection Clause of the Fourteenth (Cont'd)

Appendix B

Plaintiffs cannot understand how their request to attach rubber strips to utility poles could be denied when the Borough permits religious uses of its municipal property in general; for example, the placement of a creche and a menorah in a public park, a visit with Santa Claus in Borough Hall, an easter egg roll on the Borough Hall lawn, or an annual three-hour Good Friday march through the center of town with police traffic control. Given these uses, Plaintiffs find the Borough's decision to be unconstitutionally discriminatory, especially because the *lechis* themselves in no way interfere with safety or aesthetics, and because the municipality tolerates other uses of its municipal right-of-way, such as the placement of directional signs of several Christian churches, which contain Christian symbols, or private non-religious uses such as sprinkler systems installed by contiguous property owners. With respect to the utility poles themselves, Plaintiffs note that they are used for annual holiday displays, and have been used in the past by citizens for the placement of ribbons to signify solidarity against a proposed regionalization of the school system.

In further support of their contention that the Borough Council's decision was animated by religious discrimination, Plaintiffs point to statements by the public and by some members of the Borough Council to the effect that an *eruv* would encourage Orthodox Jews to move to Tenafly, creating

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(Cont'd)

Amendment, and notes that any potential violation of the Equal Protection Clause has not been briefed. Accordingly, the Court will not address the question of whether the Borough Council violated Plaintiffs' Equal Protection rights when it denied Plaintiffs' application to hang the *lechis*.

a community within a community and creating divisiveness in an otherwise open and tolerant town. Plaintiffs can find no rational reason for the Council's decision, particularly in light of the fact that two courts have concluded that by permitting an *eruv* on public property, a municipality does not violate the Establishment Clause. *See ACLU of New Jersey v. City of Long Branch,* 670 F. Supp. 1293 (D.N.J. 1987); *Smith v. Community Bd. No. 14,* 491 N.Y.S.2d 584 (N.Y. Sup. 1985), *aff'd.* 518 N.Y.S.2d 356 (N.Y. App, Div. 1987).

The Borough responds that its decision to deny access to the public right-of-way, and by extension to deny use of the utility poles, was constitutional. It argues that Tenafly Ordinance 691, which prohibits placing "any sign or advertisement, or other matter upon any pole," allows only for uses of the right-of-way that are expressly contemplated by municipal ordinance, and that the only use of the right-of-way not contemplated by ordinance that the Borough regularly permits is the Chamber of Commerce holiday displays. The Borough points out that the Orthodox Jews were not singled out for discriminatory treatment, since Ordinance 691 long predated the application by the Tenafly Eruv Association.

As to the use of the right-of-way for church directional signs, the Borough responds that the signs serve a purely directional purpose, and in any event the churches have been requested to remove any religious symbols from the signs. Since the other uses of municipal property by religious organizations do not occur in the right-of-way, the Borough contends that a different mode of analysis must be applied,

and that constitutional jurisprudence permits, if not mandates, municipal acquiescence to those uses.

The Borough further argues that the case law relied on by Plaintiffs, while permitting an *eruv* on public property, does not mandate the grant of permission for it. In light of the neutral language of Ordinance 691, and concerns of citizens that public property should not be dedicated on a permanent basis for use by one religious organization, the Borough believes "the eruv decision was a classic case of the legislative weighing of the enhancing benefits to some citizens against the symbolic harms associated with delineating and renting public space to a sub-group of citizens." (Defs.' Mem. of Law Surreply to Pls.' Application for a Preliminary Injunction, at 15-16.)

Did the Borough Council of the Borough of Tenafly violate the rights of Plaintiffs as protected by the First Amendment when it denied their request to access the municipal right-of-way to attach *lechis* to Verizon's utility poles? The Court finds it to be a complex question with no easy answer, both because of the factual circumstances underlying the Council's action and because of First Amendment jurisprudence itself—confusing to the judge and scholar, and impenetrable to the layman. As Justice Scalia observed "the Court's religion- clause jurisprudence . . . has been described by scholars of all persuasions, and even by the justices themselves, as unprincipled, incoherent, and unworkable."[21] Be that as it may, Plaintiffs' application for a preliminary injunction must be decided. Aware that this Court

21. Antonin Scalia, *A Matter of Interpretation* 109 (1998).

will in all likelihood not have the last word, the Court will first take up Plaintiffs' Free Expression claim.

A. *Free Expression*

The facts of this case do not fit into a neat constitutional category. Before any determination can be made as to whether Plaintiffs' rights were violated, the Court must first determine how the *lechis* themselves should be classified. Plaintiffs argue that the *lechis* and the *eruv* have expressive value to those Orthodox Jews who are *eruv*-observant, and that to preclude placement of the *lechis* on the utility poles because of the message they convey constitutes viewpoint discrimination prohibited by the First Amendment. Essentially, Plaintiffs argue that by refusing permission to place the *lechis* on the utility poles and thereby blocking the construction of an *eruv,* the Council has discriminated against them on the basis of the particular religious message they seek to express.

Although Defendants contend that the *lechis* constitute conduct and not speech, and therefore raise no Free Expression issues, this distinction between speech and conduct is not necessarily meaningful. The Court concludes that in light of *Spence v. Washington,* the *lechis* are properly classified as symbolic speech: they are intended to convey a particular message and in the context and the surrounding circumstances in which they are used, the message will be understood by those who view them. *Spence v. Washington,* 418 U.S. 405, 410-411 (1974) (holding that display of U.S. flag upside down with a peace symbol attached on both sides coinciding with Cambodian incursion and Kent State tragedy

constituted speech); *see also Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969) (wearing of black armband constituted symbolic act protected by free speech clause). That the symbolic speech is also religious exercise is not relevant; the Free Speech Clause not only protects secular private speech but also private religious expression. *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 759 (1995).

Of course, just because Plaintiffs wish to use the utility poles for otherwise protectable expression does not automatically entitle them to do so. The First Amendment does not guarantee access to property for expression just because it is owned or controlled by the government. *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 113, 130 n.6 (1981). The mere fact that the state cannot suppress speech in public places does not mean that the state must guarantee a forum on all property that it owns. *Pinette,* 515 U.S. at 761. "Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 799-800 (1985).

Because the Government can impose access restrictions of varying degrees based on the nature of the property in question, a determination of when the Borough of Tenafly must permit Plaintiffs access to its property, when it may permit access, and when it need not permit access for expressive purposes requires the Court to determine how the utility poles and the right-of-way should be categorized.

Appendix B

To determine what access restrictions are appropriate for particular property, the Supreme Court has adopted a forum analysis consisting of three categories of forum: the public forum, the designated (or limited public forum), and the nonpublic forum. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983).

Streets, parks, or a town square are typical public forums, because they have traditionally been used for public discourse and debate. In a public forum, absent a compelling interest the state may not prohibit expression, but may place reasonable restrictions only on the time, place and manner of that expression. *Id.* at 44, 103 S. Ct. 948; *Pinette,* 515 U.S. at 761.

The second category of forum, a limited or designated public forum, is created when the state, although not required to do so, opens public property for expressive purposes. This property is necessarily of a type that is not traditionally open to the public for expression. *Perry,* 460 U.S. at 45. Examples of such a forum would be university meeting facilities, a school board meeting, or a municipal theater. *See respectively Widmar v. Vincent,* 454 U.S. 263 (1981); *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). The same standards apply to a limited or designated public forum as apply to a traditional public forum: while the state cannot prohibit all communicative activity, reasonable time, place and manner regulations pass constitutional muster; as do content-based prohibitions drawn narrowly to effectuate a compelling state interest.

Appendix B

A different standard applies to public property that is not by tradition or designation a forum for public communication. It is this third category, the nonpublic forum, that commands the Court's attention in this case.

Rights-of-way and utility poles are certainly not traditional forums to which the public has had open access for discourse. While the Supreme Court has noted that "[l]ampposts can of course be used as signposts, . . . the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 814 (1984). In this case, there is no evidence that the Borough has ever allowed the utility poles or its right-of-way to be used by the public for unfettered discourse or debate.

It is true that with the Borough's express permission the poles have been used by the Chamber of Commerce for its holiday displays, and with the Borough's tacit consent the right-of-way is home to at least a pair of church directional signs, but those instances alone do not support a finding that the municipality has opened what is otherwise a nontraditional forum to the public for discourse. In any event, the mere fact that some private expression has occurred in a forum either as the result of government inaction or limited governmental permission does not open a nontraditional forum to the public for discourse. *Cornelius,* 473 U.S. at 802. Based on this, and in light of all the evidence, the Court concludes that the utility poles as well as the Borough's right-of-way are nonpublic forums.

Appendix B

In directing how municipal property should be classified for forum analysis purposes, the Supreme Court has counseled that in cases where limited access is sought, a Court should take a tailored approach to ascertaining the perimeters of the relevant forum within the confines of government property. *Cornelius,* 473 U.S. at 801. In *Perry,* for example, the relevant forum was not an entire school, but the internal mail system and mail boxes within that school to which the plaintiffs sought access. *See Perry,* 460 U.S. at 46. In *Cornelius,* the relevant forum was not the Federal workplace, but the fund drive to which plaintiffs sought access. 473 U.S. at 801. Based on this guidance, the Court concludes that since Plaintiffs seek access to the utility poles specifically, the utility poles are the relevant forum, as distinct from the entire municipal right-of-way.

The classification of the utility poles as a nonpublic forum has constitutional importance because access to nonpublic forums for expressive purposes can be more tightly restricted than access to public forums. "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806. In *Cornelius,* the Supreme Court held that the Government did not violate the First Amendment when it excluded legal defense organizations from participating in a charity drive aimed at federal employees. After concluding that the charity drive in question was a nonpublic forum, the Supreme Court found reasonable the Government's decision to limit access in order to minimize disruption of the federal workplace, and to ensure success of the fund raising effort while avoiding the appearance of political favoritism.

Even in a nonpublic forum, however, the *Cornelius* Court found that the Government is not free to restrict speech in order to repress it. *See Pinette,* 515 U.S. at 76; *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 390-95 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 828 (1995) (Regardless of the forum in question "[d]iscrimination against speech because of its message is presumed to be unconstitutional"). Restrictions must in all circumstances be "'reasonable and . . . not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius,* 473 U.S. at 801 (1985) (*quoting Perry,* 460 U.S. at 46). Premised on this, the Supreme Court remanded *Cornelius* to determine whether the Government had impermissibly excluded organizations from the federal fund drive not on some reasonable basis, but because the Government disagreed with their points of view.

Viewpoint discrimination results if the government targets not only subject matter, but particular views taken by speakers on a subject. *Rosenberger,* 515 U.S. at 829. An example of viewpoint discrimination at work can be seen in the case of *Grossbaum v. Indianapolis-Marion County Building Authority ("Grossbaum I"),* 870 F. Supp. 1450 (S.D. Ind. 1994). The underlying dispute in *Grossbaum I* spawned a number of subsequent decisions that are instructive with respect to the issues in this case. *See Grossbaum I,* 870 F. Supp. 1450, *rev'd. by Grossbaum v. Indianapolis Marion County Building Authority ("Grossbaum II"),* 63 F.3d 581 (7th Cir. 1995), *on remand, Grossbaum v. Indianapolis-Marion County Building Authority ("Grossbaum III"),* 909 F. Supp. 1187 (S.D. Ind.

1995), *aff'd. by Grossbaum v. Indianapolis-Marion County Building Authority ("Grossbaum IV")*, 100 F.3d 1287 (7th Cir. 1996), *cert. den.*, 520 U.S. 1230 (1997). The entire controversy began when Rabbi Grossbaum sought to compel the Indianapolis Building Authority to allow him to display a menorah in the lobby of the City-County building during Chanukah. Even though the city had erected a Christmas tree in the lobby, and allowed other uses of the lobby, it denied the Rabbi's request to set up a menorah.

The parties stipulated that the lobby in question was a nonpublic forum. The trial court initially denied relief, concluding that prohibiting the display of a menorah after permitting the secular display of a Christmas tree did not constitute viewpoint discrimination on the part of the Government. The Court of Appeals for the Seventh Circuit reversed, holding that so long as other organizations remained free to apply for space in the City-County building for non-religious messages, the Board could not prohibit display of the menorah solely because of the religious perspective of its message, without running afoul of the Free Expression Clause. *Grossbaum II,* 63 F.3d at 592.

Unlike the regulation in *Grossbaum* that facially imposed access restrictions on the basis of a speaker's religious point of view, on its face Tenafly Ordinance 691 does not differentiate based on anyone's viewpoint, let alone Plaintiffs'. Enacted in 1954, the ordinance does not regulate requests for access based on either content or message. Instead, it provides in relevant part:

> No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone,

> sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.

(Tenafly Ordinance 691 Article VIII(7)). In effect, Tenafly Ordinance 691 allows access only if it is expressly authorized by ordinance. Since no Tenafly ordinance authorizes the placement of signs or other non-utility matter upon utility poles in Tenafly, any such placements, including the *lechis* required to form the *eruv,* are presumptively barred by Tenafly Ordinance 691.

There is no evidence in the record that other religious organizations, private citizens, or commercial enterprises ever applied for permission to utilize the utility poles for expressive speech of any kind, be it religious, secular, or commercial speech. Indeed given the language of the ordinance, it would be difficult to see how the Borough could grant such permission, since Ordinance 691 does not provide for legislative discretion. In any event, there is no evidence that the Borough ever granted an application for use of the utility poles that involved a use similar to the attachment of the *lechis.*

Tenafly Ordinance 691 predates Plaintiffs' request for access, and represents a reasonable effort to restrict municipal property to the use for which it has been lawfully dedicated (i.e. utility use only). By prohibiting "*any* sign or advertisement, or other matter upon any pole," it is neutral on its face. A decision enforcing such a neutral ordinance is immune from any constitutional infirmity on the ground that it constitutes viewpoint discrimination, so long as the facially

neutral provision is not applied in a manner that has the effect of discriminating against Plaintiffs on the basis of the view they wish to express.

Plaintiffs argue that this is exactly what occurred, for in practice they assert that the Borough has discriminated against the *eruv*-observant viewpoint by denying their request, while allowing other private actors access to the right-of-way for expressive purposes, in violation of Tenafly Ordinance 691. They contend that but for the message conveyed by the *lechis* and the *eruv,* they would have been granted permission to engage in what amounts to an otherwise innocuous use of the utility poles.

Plaintiffs' argument rests first upon the Chamber of Commerce holiday displays. In his Affidavit Joseph DiGiacomo, the Tenafly Borough Administrator, explained that:

> The holiday decorations placed on utility poles are paid for by local businesses. This is done through the Chamber of Commerce. The purpose is to promote a shopping atmosphere in downtown Tenafly during the holiday season. They remain in place for approximately six weeks. They are intended to be nondenominational and are certainly nonreligious. They are intended to convey a wintry holiday theme and nothing else.

(DiGiacomo Second Aff. ¶ 4.) Mindful that if "it looks like a duck, walks like a duck and quacks like a duck, it's a duck—

not a platypus,"[22] the Court finds that the decorations are what they are: decorations. They do not constitute symbolic speech as that term is understood in a constitutional sense. *See Spence v. Washington,* 418 U.S. at 410-411.[23]

Even if the holiday displays do have some de minimis expressive value, they are of a fundamentally different character than the *lechis.* First, it is arguably commercial speech, since it is paid for by local businesses and placed by the Chamber of Commerce, in order to promote a holiday shopping atmosphere. Just because a municipality allows commercial speech in a nonpublic forum does not mean that it must subsequently permit religious or political speech in that same nonpublic forum. *See Children of the Rosary v. City of Phoenix,* 154 F.3d 972 (9th Cir. 1998) (opinion of White, Associate Justice, (Ret.)).

Second, the holiday displays exists for only six weeks a year, as distinct from the proposed permanent installment of the *eruv.* Since it is axiomatic that even in a public forum a municipality may impose reasonable time, place, and manner restrictions on access, a determination by the Borough that it did not wish to have a permanent private religious installation in its right-of-way could form a reasonable basis for its denial, so long as it did not allow any other permanent private expressive installations.

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22. *Pieper v. Commercial Underwriters Ins. Co.,* 59 Cal.App.4th 1008, 1014 (1997).

23. Similarly, seasonal greenery and even Christmas trees have been routinely held to have no religious content. *See, e.g., Lubavitch Chabad House, Inc. v. City of Chicago,* 917 F.2d 341, 345 (7th Cir.1990).

Finally (and most importantly), the holiday displays are not expression of the same character as the *lechis.* When a municipality opens a closed forum for limited uses, the constitutional right of access extends only to uses of similar character. *Perry,* 460 U.S. at 48. Had Plaintiffs been denied access to place their own secular seasonal display on the poles, they might well have a claim for viewpoint discrimination, but that is not what has occurred in this case. Rather than seeking access for use of a type that had previously been permitted by the Borough, Plaintiffs attempted to break new ground by asking for a permanent religious installation on closed municipal property.

The remaining examples of utility pole usage cited by Plaintiffs are also unavailing. Even though the tying of ribbons around utility poles as an expression of discontent with the proposed regionalization of Tenafly's schools likely constituted symbolic speech, *see Tinker,* 393 U.S. 503, the Court lacks sufficient information to conclude that 1) the Borough was aware the ribbons existed, and 2) that the Borough at least tacitly approved of their private maintenance in the right-of-way.

Regardless, one prior instance of unauthorized use of the utility poles for politically expressive purposes hardly demonstrates a differential application of Ordinance 691 by the Borough in this case. Similarly, examples of private residents putting up house numbers or lost dog notices (which the Borough has subsequently endeavored to remove) also fail to support the thesis that the Borough permits some expressive uses of the utility poles but denies similar religious expression on the basis of either its religious message or the speaker's viewpoint.

Appendix B

Although the Court has concluded that the utility poles are the relevant forum for its analysis, what if the relevant nonpublic forum is not just the utility poles, but the entire municipal right-of-way? Plaintiffs point to the church directional signs as evidence that the Borough's denial of their application amounted to viewpoint discrimination, since Tenafly Ordinance 691, which governs the right-of-way and utility poles equally, was not enforced against the churches' expressive use of the right-of-way. By Plaintiffs' argument, since the utility poles are in the right-of-way, and since the church signs are in the right-of-way, by opening the right-of-way to the permanent expressive church signs the Borough has placed itself in a position where it cannot subsequently deny Plaintiffs' request for access to the poles for their own permanent expression. Even though this argument appears to have merit, in the final analysis the court concludes for a number of reasons that it is not enough to sustain a determination that the Borough is engaging in viewpoint discrimination.

In the first place, the Borough never considered the placement of the church signs at all, let alone considered whether the signs expressed an acceptable religious viewpoint. In fact, when the Borough Administrator was confronted with the issue of the signs, he initially thought that the signs were in the county right-of-way. (4/30/01 Tr. at 56:16-21.) Although the Borough Administrator did note after further review that some of the signs were in fact in the Borough right-of-way, he also noted that they had not been erected by the Borough, were not authorized by ordinance and "[had] been allowed to remain as they serve a public purpose in that they provide directions to motorists." (DiGiacomo Aff. ¶ 6.)

Second, the Court finds that the signs are not intended to express a religious viewpoint, or any other viewpoint for that matter. The evidence demonstrates that the Borough permits their continued maintenance on public property because they serve the utilitarian function of providing traffic directions. That the signs contain Christian symbolism is, if at all relevant, marginal to the purpose of the signs, since no one has questioned their primarily directional purpose. In any event, the Borough has written to the churches requesting that they remove any religious symbolism from the signs.[24]

Given the purely functional nature of the signs, similar to the holiday displays the Court finds that the church directional signs are of a different character than the *lechis,* and that simply because the Borough opened its right-of-way to one does not mean that it necessarily had to open its right-of-way to the other. Had Plaintiffs been denied access for placement of a directional sign to their Temple the Court's analysis would be different, but again that is not what occurred in this case.

With the exception of the church signs, Plaintiffs have failed to provide the Court with any other examples of the right-of-way's use for private expression. Although there is evidence that businesses have been permitted to place signage advertising their establishments in the right-of-way immediately adjacent to their property, (Pls.' Ex. 7), as previously noted opening the right-of-way to some

24. At the time of the July 19, 2001 oral argument, the churches had yet to comply with the Borough request. (*See* Nelkin Suppl. Aff. ¶ 3.)

commercial speech does not necessarily require opening it to core political or religious speech. Similarly, it is both hardly surprising and constitutionally irrelevant that the right-of-way has been opened to non-expressive private uses such as the placement of sprinklers, and that the utility poles have been used for private utility uses such as Metricom's transmitters. Given the foregoing, vital to the Court's conclusion that there has been no Free Expression violation here is the finding that none of the past or present private uses of the right-of-way are in any way similar in character to the access now requested by Plaintiffs.

In operation, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger,* 515 U.S. at 829 (*citing Perry,* 460 U.S. at 46). In this Court's opinion, none of the foregoing facts are sufficient to sustain a conclusion that in applying Tenafly Ordinance 691 against Plaintiffs' request, the Borough has effectively tolerated some private expression in the right-of-way but denied to Plaintiffs comparable access on the basis of their specific motivating ideology, opinion or perspective. In fact, the weight of the evidence points to the fact that as a general rule, Tenafly does not tolerate any private, non-commercial expression in its right-of-way.

For example, an ordinance forbids the placement of garage sale signs on utility poles in Tenafly, or elsewhere in the right-of-way. (Tenafly Ordinance 99-24, attached to DiGiacomo Aff. as Ex. A.) House numbers on utility poles are not permitted either, and homeowners are required to remove them when the Borough becomes aware of their

existence. (*Id.*) By the Borough's account, these regulations which prohibit the private placement of signage in the right-of-way are strictly enforced. (*Id.*)

Since Borough of Tenafly Ordinance 691 is content neutral, and since there is no evidence that the Borough has tolerated some expressive uses of the poles while prohibiting other such uses on the basis of the message conveyed, the only issue remaining in this discussion of viewpoint discrimination is whether the Borough Council's motive in denying permission to attach the *lechis* to the utility poles might be relevant to the Court's analysis. Once again the *Grossbaum* line of cases is instructive. After the Indianapolis-Marion County Building Authority lost to Rabbi Grossbaum in *Grossbaum II,* it adopted a ban on all displays in the lobby of the Government Building, except on displays maintained by government tenants. Rabbi Grossbaum and other plaintiffs again sought an injunction, but again lost at the trial court level. *See Grossbaum III.* On appeal the plaintiffs argued that even though the new rule was viewpoint neutral on its face and in its application, its adoption had been unconstitutionally motivated by the desire to retaliate against the plaintiffs for previous litigation and to discriminate against their religious viewpoint.

After a thorough analysis of the role motive plays in constitutional adjudication, the Seventh Circuit Court of Appeals concluded that when the government enacts a content-neutral speech regulation for a nonpublic forum, the intent of the government actors in instituting that regulation is irrelevant. *Grossbaum IV,* 100 F.3d at 1298. Regardless of the intent of the government officials, the regulation is

constitutional so long as it treats all viewpoints equally on its face and is neutrally applied. *Id.; see also Children of the Rosary v. City of Phoenix,* 154 F.3d at 980 (in nonpublic forum city may implement neutral policy to allow commercial speech but exclude political and religious speakers, so long as policy does not reflect intent to use policy to exclude disfavored perspectives on issues).

"Where . . . the government enacts a content-neutral speech regulation for a nonpublic forum, there is no concern that the regulation is 'in reality a facade for viewpoint-based discrimination.'" *Grossbaum IV,* 100 F.3d at 1298 (*citing Cornelius,* 473 U.S. at 811.) Because Tenafly Ordinance is a content-neutral speech regulation, and because there is no evidence that as applied it discriminated against Plaintiffs' viewpoint, the Court concludes that the Borough Council's motive in electing to enforce Tenafly Ordinance 691 is not relevant to its Free Expression analysis.

Because neither the utility poles nor the right-of-way are traditionally or by overt governmental act dedicated to public discourse, they are nonpublic forums for private expressive purposes.[25] In that framework, the Court concludes Tenafly Ordinance 691 is a reasonable, facially neutral restriction on access to the right-of-way, that as applied did not have the

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25. The Court is mindful of the Seventh Circuit's observation that "the nonpublic forum case is easier because of the stronger government interest in controlling property not dedicated to public discourse, and because of the lesser role that nonpublic fora generally play in the marketplace of ideas." *Grossbaum IV,* 100 F.3d at 1299 (*citing Perry,* 460 U.S. at 49, *and* Richard A. Posner, *Free Speech in an Economic Perspective,* 20 Suffolk U.S. Rev. 1, 52 (1986)).

effect of discriminating against Plaintiffs' viewpoint. Accordingly, the decision of the Borough Council to enforce Ordinance 691 and to deny Plaintiffs' request for access to the utility poles for purposes of religious expression did not violate the Free Expression Clause of the First Amendment.

B. *Free Exercise*

Plaintiffs also argue that when the Borough Council denied their request to maintain the *lechis* on the utility poles in order to establish an *eruv,* the Borough violated their right to the Free Exercise of their religion under the First Amendment. The argument takes several forms: first, the Borough should be required to accommodate their need for an *eruv* to facilitate their observance of the Sabbath; second, by denying them an *eruv* the Borough Council impermissibly infringed on the exercise of their religion; and finally that the Borough Council discriminatorily applied Tenafly Ordinance 691 when it denied their request, because they wanted to keep Orthodox Jews from moving into Tenafly.

While the Court is certain that the accommodation argument makes sense to Plaintiffs, the Court is just as certain that it is without merit under existing constitutional jurisprudence. Tenafly Ordinance 691 is a neutral regulation of general applicability. Everyone is bound by it. No one has the right to use the poles for either expressive speech or religious exercise. Given this generally applicable restriction, the accommodation of Plaintiffs' request would amount to granting a sectarian religious group preferential access to governmental property, and would violate the Establishment Clause. *See Pinette,* 515 U.S. at 766.

Moreover, because the municipality has a strong interest in preserving the property under its control for its intended use, it may permissibly deny Plaintiffs access to the utility poles. That holds true even if the denial of access to the property results in an incidental burden to the Free Exercise of their religion. Whatever claim the Eruv Association might have to use the utility poles in the right-of-way, that claim does not divest the government of its right to control "what is, after all, its land." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 453 (1988). The First Amendment restrains certain governmental interference with religious exercise; it does not require governmental action to facilitate that religious exercise. As Justice Douglas put it:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a (benefit), the better to exercise them. The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.

Sherbert v. Verner, 374 U.S. 398, 412 (1963).

In arguing that the Borough's denial has interfered with the Free Exercise of their religion, Plaintiffs rely principally on two cases, one from the Third Circuit and the other from the Supreme Court, neither of which are applicable to the facts of this case. In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), the Borough Council voted to erect a

gate on its property to prevent the plaintiffs from having access to a contiguous property on which the plaintiffs intended to hold a tent revival meeting. The Third Circuit held that where deliberate interference with religious activity is alleged, the pivotal issue is not the extent of the burden on religious exercise, but instead whether defendants intended to impose a burden. 35 F.3d at 848.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), the City of Hialeah enacted ordinances that were purportedly intended to prevent cruelty to animals by precluding their ritual slaughter, but that were in fact targeted at the Santeria religion. The Supreme Court held that the ordinances were impermissible, because they were neither neutral nor of general application, and because the City did not have a compelling governmental interest that would justify targeting religious activity. 508 U.S. at 547.

In the case at hand, Tenafly Ordinance 691 is a pre-existing, neutral law of general applicability. By enforcing it, the Borough Council has neither "intentionally imped[ed] the plaintiffs' religious activity" as in *Brown,* nor enacted an ordinance targeting the plaintiffs' religious activity as in *Hialeah.* Accordingly, even if the denial of access to government property imposes an incidental burden on Plaintiffs' religious exercise, there needs to be no compelling governmental interest to justify it. *See Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990). In the face of Ordinance 691, Plaintiffs had no right to the use of the utility poles in the first place; therefore at worst the Borough only incidentally interfered with Plaintiffs'

exercise of their religion by denying them a use to which they were not entitled. An incidental burden of this type can not form the basis of a Free Exercise violation. *See Bowen v. Roy,* 476 U.S. 693, 702 (1986); *Lyng,* 485 U.S. at 449.

The last facet of Plaintiffs' Free Exercise claim, that the Borough Council was motivated by a discriminatory animus in its enforcement of Tenafly Ordinance 691, is the most serious and the most troublesome issue in the case. Plaintiffs argue that:

> the purported rationale for the decision of the Council denying the plaintiffs the right to maintain the *eruv* is a pretextual afterthought. The real reason comes through loud and clear in the contemporaneous statements and even in the affidavits of the defendants—the Council did not want an *eruv* because it would attract more Orthodox Jews to the community.

(Plaintiffs' Reply Memorandum of Law, p. 3.)

In this case, the parties have provided evidence of the history of the dispute, including comments from the public and some Council members made prior to the Council's decision, as well as affidavits which were prepared and submitted after the vote took place. All of the Council members who voted and several other key witnesses also testified before the Court at the evidentiary hearing. This evidence has been set out at length in the first part of the Opinion. What was said and done is largely undisputed; what is disputed is the meaning of it all.

Appendix B

Plaintiffs argue that the affidavits and testimony of the Council members demonstrate that the Council was motivated by discriminatory animus. In support of their argument, they rely on a number of particular statements made by various Council members. By way of example, Councilman Wilson testified that by creating an *eruv* "there is a tendency over the years to then have only people of that particular Orthodox Jewish faith to live in that neighborhood." (Wilson Tr. 78:14-16.) Councilman Lipson testified that he feared that an eruv would lead to the establishment of many small houses of worship, and that he wanted to keep Tenafly "the way it is." (Lipson Tr 23:20-24; Lipson Aff. ¶ 12.) Councilman Peck acknowledged that denying an *eruv* would adversely impact those Orthodox Jews who felt an *eruv* was necessary and were contemplating a move to Tenafly. (Peck Tr. 106:10.) Councilwoman Kerge said in effect, that the concept of building an Orthodox Jewish community "within a community poses serious questions for Tenafly." (Kerge Tr. 52:7-15; Kerge Aff. ¶ 9.). Councilman Sullivan in his affidavit stated that "the TEAI erected an *eruv* in a manner that presented and created a situation, causing much dissension in Tenafly. The failure to find harmony and to compromise by seeking to establish an *eruv* with natural boundaries weighed upon my decision." (Sullivan Aff. ¶ 7.)

In view of these statements, and other testimony of Council members Wilson, Lipson and Kerge, it is the Court's conclusion that one of several factors motivating at least three of the members of the Borough Council was a concern about the perceived communal divisiveness that an *eruv* would generate. That having been said, the Court wants to make it quite clear that there is no evidence to support a conclusion

that the Borough Council acted out of animosity to Judaism in general or to Orthodox Jews in particular. The court finds credible the testimony of all the members of the Council that their vote was not affected in any way by any animosity or prejudice against Orthodox Judaism or that they harbored any animosity or prejudice against Orthodox Jews. As Councilman Sullivan stated:

> Tenafly is ecumenical. It is the proud home of a vibrant, Orthodox Jewish community and synagogue. The town has an Orthodox Greek Church, an Armenian Orthodox Church, a Reformed Jewish Synagogue, a Roman Catholic convent, a Roman Catholic priory, a Carmelite rectory and numerous Protestant denominated Houses of Worship. Hindus, Muslims and Buddhists also reside in Tenafly. The town is proud to share its cultures and religious traditions. I believe that we as citizens can help each other rather than permit government to dictate how we practice religion through fiat.

(Sullivan Aff. ¶ 5.)

While the members of the Council did not vote out of animosity or prejudice against Orthodox Jews, one of the reasons they did vote to deny the Plaintiffs' application was because of the perceived divisiveness and exclusivity that an *eruv* would generate in Tenafly. This desire to deny an *eruv* in part because of the perceived trouble associated with the creation of a "community within a community" certainly

qualifies as a constitutionally impermissible motive for denying Plaintiffs' request to append *lechis* to the utility poles.

Having reached that conclusion, however, the Court notes that the "leap from nefarious motive to constitutional violation . . . is by no means an automatic one under constitutional case law." *Grossbaum IV,* 100 F.3d at 1292. The Court concludes that even though a constitutionally impermissible factor formed part of the Council's motivation in denying Plaintiffs' request, the existence of that impermissible motive does not suffice to grant Plaintiffs the relief requested, because the Borough has also articulated a compelling interest for its denial of the *eruv* application.

Although normally, "[t]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," and normally "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *Lukumi,* 508 U.S. at 532, a law which targets religion in a non-neutral manner may be valid if "it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 533 (internal citations omitted).

Avoiding an entanglement with religion clearly concerned the Borough Council. The Court concludes that a substantial factor leading to the decision by the Borough not to permit Plaintiffs' request for access to the utility poles was the Council's concern about dedicating municipal property on a permanent basis for religious purposes.

Appendix B

Because all of the members of the Council testified, the Court was afforded an opportunity to assess their credibility and evaluate the truth of the statements in their affidavits in light of their trial testimony. With respect to their reasons for denying the erection of the *lechis* and the creation of the *eruv,* the Court finds their hearing and affidavit testimony to be credible. The court rejects Plaintiffs' argument that the reasons given were pretextual or after-the-fact justifications.

In support of the conclusion that the Council wished to keep permanent religious installations out of its right-of-way, the Court looks to statements made by all of the Council members. By way of example, Councilman Wilson stated in his Affidavit:

> What I found most ominous however in the rational for erecting an eruv was the permanency of the installation once completed. This would be in sharp contrast to other religious symbols currently erected on Borough properties temporarily for a matter of weeks to celebrate the holiday season. This includes the menorah, which is erected on a Borough park for a limited number of days each year.

(Wilson Aff. ¶ 7.) At the evidentiary hearing Wilson reiterated his concern about approving a religious symbol of a permanent nature in the public right-of-way, and noted that it was something the Borough council had never permitted before. (Wilson Tr. at 84:5-25.) Similarly, Councilman Lipson stated in his affidavit that:

> the main reason I voted against allowing an eruv to be established on public property is that I

> believe it will be disruptive. I am very upset at the comments made by orthodox Jews against those of us who are Jewish who do not agree with them. I think the tone of the attack on Tenafly in the papers filed by the TEAI shows that I am right in thinking that an eruv leads to anger and strife within a town.

(Lipson Aff. ¶ 10.)

Councilman Peck also stated in his affidavit his reasons for denying Plaintiffs' request. Among others, one of his concerns was about allocating public property for religious use:

> To give a right to use public property and land permanently for a particular religious purpose would establish a precedent for the similar granting of rights to any groups who request them in the future.

(Peck Aff. ¶ 3.) Peck also questioned on what ground local authorities would pick and choose between multiple, perhaps mutually exclusive, requests for religious use of municipal property. (*Id.*) Additionally, "[s]ince [Plaintiffs] also believe that only a civil authority can grant permission for an *eruv*," Councilman Peck was concerned that "such a request would bring the civil authority to act on behalf of a particular religious group. This appears to me to violate the constitutional separation of church and state." (Peck Aff. ¶¶ 3, 5.)

In her affidavit, Councilwoman Kerge said that it was her understanding than a town is free to permit or deny an

eruv, and that as she understood it "an *eruv* is an accommodation the absence of which does not in any way prohibit the free practice of religion," and that the Borough's right-of-way "should not be used for symbolic or religious or accommodation purposes for any group." (Kerge Aff. ¶¶ 8,11.)

Lastly, at the evidentiary hearing Councilman Sullivan was asked on cross-examination to explain what he meant by "free association" in paragraph 4 of his Affidavit, which reads:

> After careful reflection of the *eruv*, I discerned that the *eruv* is an explicit religious symbol that, while not necessarily required to practice Orthodox Judaism, does designate the area enclosed by an *eruv* as reshut hayachid. Certain Orthodox rabbinical writings refer to the reshut hayachid as the religious extension of the home, a private domain. There, I determined that the eruv contravenes the rights of Tenafly's residents to free association without religious and government interference.

(Sullivan Aff. ¶ 4.) Councilman Sullivan responded:

> I did not think it proper that the eruv be established in a manner that would involve both the government and a religious entity. And as a consequence, it was my feeling that we had best try to stay clear of the issue, and that is what I meant by that "free association."

(Sullivan Tr. 9:19-23). Given his beliefs, Councilman Sullivan worked to find a compromise so as to avoid having the *eruv* on public property. (Sullivan Tr. at 28:8-10.)[26]

Much has been made by Plaintiffs of comments by the Mayor, comments that she denies making or now contends were misconstrued. This factual dispute need not detain the Court, since the Mayor did not and could not vote on the resolution. Plaintiffs nevertheless contend that the Mayor played a pivotal role in the decision making process. There is no evidence for this. Just the contrary. At the July 8, 1999 work session the mayor argued in favor of the *eruv,* but obviously no one on the Council adopted her position. This is not surprising, since the evidentiary hearing left the Court with the impression that each of the members of the Council are very independent-minded individuals.

Finally, Plaintiffs argue that any concerns expressed by the Borough about the public's perceptions as to religious endorsement must be pretextual, because the Borough tolerates the use of its property for other religious purposes. Plaintiffs have not, however, produced any evidence that the other uses (i.e. the Good Friday March, or the easter egg

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26. These efforts on the part of Sullivan seem to demonstrate that at least some of the Council members did not object to the *eruv,* per se, but objected only to its placement on public property. From this the Court concludes that the restrictions the Borough Council placed on Plaintiffs were narrowly tailored to further their interest in avoiding the appearance of an Establishment Clause concern, since permitting an *eruv* on private property would generate no such concerns.

roll) are at all similar to the circumstances in this case, namely that they consist of permanent constructs on nonpublic municipal property, that would raise the specter of Establishment Clause concerns. What to a layman may be inconsistent uses of municipal property may under existing constitutional jurisprudence result from the conflict between what is prohibited with what is permissible.[27] In any event, there is no evidence that the Borough has authorized symbolic religious speech on municipal property in such a way that would allow the Court to conclude that its refusal to permit *lechis* on the utility poles in its right-of-way evidences an intent to discriminate against Orthodox Jews, or that its "appearance of entanglement" concerns are anything less than sincere.

Similarly unavailing is Plaintiffs' argument that because the Borough Attorney had advised the Council that it could

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27. Any exercise which attempts to reconcile permitted and prohibited uses would take us far afield and into Establishment Clause jurisprudence, an area of the law which has its own peculiarities. *See American Civil Liberties Union of New Jersey v. Schundler,* 931 F. Supp. 1180 (D.N.J. 1995). In *Schundler,* a trial judge enjoined Jersey City from maintaining on city hall plaza a holiday display containing creche, menorah, and Christmas tree, but permitted a modified display that included Santa Claus, Frosty the Snowman and Kwanzaa symbols, thus "sufficiently demystifing the holy." On appeal, the original display was affirmed but as to the modified display reversed and remanded. 104 F.3d 1435 (1997). On remand the District Court reversed itself and enjoined the modified display, only to have that decision reversed by another panel of the Court of Appeals which permitted the modified display and observed that the prior panel's language on this issue was dicta. 168 F.3d 92 (1999).

permit the *eruv* without violating the Establishment Clause, the preceding argument about avoiding the appearance of entanglement must be pretextual.[28] Even though Defendants did receive the advice in question, there is no reason to doubt that the Council members were legitimately concerned about the *appearance* of the propriety of such a use, both as a matter of Borough policy and as a matter of what implications permitting such use would have for the future. As previously noted, the Court finds the Council's testimony on this issue to be credible.

This is supported by the fact that members of the public repeatedly voiced their concern about the legitimacy of using municipal property for religious purposes in light of church state issues. For example, at the July 9, 1999 work session John Wilner, a Presbyterian Minister in Tenafly, expressed his fear that:

> I believe this could become a test case in the courts over this matter because there are very strong feelings in the community, Christians and Jews on this. That are concerned that this community

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28. Amicus argues that complete analysis of the case is not possible without a determination of whether the erection of an *eruv* violates the Establishment Clause, particularly in light of the concerns of the members of the Council on that very question. The Court declines the ACLU's invitation. First, the parties early in the case advised the Court that the Establishment Clause was not an issue in the case, and did not brief it. Secondly, Defendants are not claiming any affirmative Establishment Clause defense to either viewpoint or Free Exercise discrimination. Finally, the Court need not reach the Establishment Clause in light of the result reached in this decision.

> maintain a separation of church and state and be committed to diversity.

(7/8/99 Tr. p. 13.) This echoed the perception of some members of the public that the municipality should not be involved with the creation of an *eruv* because of its religious connotations.

There is a paucity of case law in this area. Without ruling on the question directly, the Third Circuit has hinted that maintaining the appearance of religious neutrality could in fact be considered a compelling interest for justifying governmental conduct even when that conduct otherwise burdens religion. *United States v. Board of Educ. for the School Dist. Of Philadelphia,* 911 F.2d 882, 885 n.5 (3d Cir.1990) (*citing Cooper v. Eugene School Dist. No. 4J,* 723 P.2d 298, 308 (1986), *appeal dismissed* 480 U.S. 492 (1987)). Given such concerns, the Court concludes that the Council was perfectly within its rights when it sought to take the church-state issue "off the table" in so far as the use of its own property was concerned, whether or not such a use actually violated the Establishment Clause. *Cf. Cornelius,* 473 U.S. at 811 (Government property manager's justification for excluding certain groups to quell controversy permissible if not a facade for viewpoint discrimination); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1109 (7th Cir. 1986) (desire to avoid potentially disruptive controversy and to maintain appearance of neutrality could justify viewpoint neutral exclusion of speakers from nonpublic forum). After the experiences of Jersey City referred to in footnote 27, and given the potential litigation which faced the Borough of Tenafly over the creche and

menorah in its park at the time the *eruv* decision was made, who can blame the Borough Council for wishing to avoid this thorny issue? Because the Court concludes Defendants had a compelling justification for denying Plaintiffs' request, Plaintiffs are not likely to succeed on the merits of their Free Exercise claims.

C. *Plaintiffs' Fair Housing Act Claim*

Distinct from their constitutional claims, Plaintiffs claim that they are also entitled to relief under the Federal Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.* The relevant portion of the FHA makes it unlawful to:

> refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny,* a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (emphasis added). Plaintiffs contend that by being denied permission to erect the *eruv,* the Borough Council "otherwise made unavailable or denied" them access to housing in Tenafly, on the basis of their religion.

The phrase "otherwise make unavailable or deny" has been interpreted to reach a wide variety of discriminatory housing practices.[29] *See, e.g., Huntington Branch, NAACP*

29. 42 U.S.C. § 3602(f) defines a "discriminatory housing practice" as any act that is unlawful under 42 U.S.C. §§ 3604, 3605, 3606, or 3617. Therefore, for purposes of this case, pursuant to (Cont'd)

v. Town of Huntington, 844 F.2d 926, 938 (2d Cir.), *aff'd.* 488 U.S. 15 (1988) (per curiam). Defendants assert that even if their denial of the *eruv* application was discriminatory, it did not "make unavailable or deny" housing to Plaintiffs, and as a result it did not constitute a "discriminatory housing practice" for purposes of the FHA. Accordingly, Defendants contend that Plaintiffs lack standing to pursue a claim under the FHA.[30]

One of the more frequent uses of the "otherwise make unavailable or deny" language of 42 U.S.C. § 3604(a) has been to prevent discriminatory zoning practices, which are not contemplated by the other provisions of the FHA. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Huntington,* 844 F.2d at 938; *Park View Heights Corp. v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974). In addition to exclusionary zoning, mortgage and insurance redlining,

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(Cont'd)

§ 3604 a "discriminatory housing practice" would be any practice which otherwise "makes unavailable or denies" a dwelling to someone on the basis of their religion.

30. 42 U.S.C. § 3613 sets forth who may bring a civil action under the FHA. Pursuant to 42 U.S.C. § 3613(a)(1)(A), "[a]n aggrieved person may commence a civil action . . . after the occurrence or the termination of an alleged discriminatory housing practice . . ." 42 U.S.C. § 3602(i)(1)-(2) defines an aggrieved person as any person who has either been injured by a discriminatory housing practice, or who believes that such injury is imminent. Accordingly, if a given act about which a plaintiff complains is not a "discriminatory housing practice," they lack standing to bring a claim under the FHA.

block-busting, racial steering and any "other actions by individuals or governmental units which *directly affect the availability* of housing" also qualify as discriminatory housing practices under the "otherwise make unavailable or deny" language of 3604(a). *Southend Neighborhood Improvement Assoc. v. County of St. Clair,* 743 F.2d 1207, 1209-10 (7th Cir. 1984) (emphasis added).

While the FHA is a broadly drafted statute which "reflects Congress's intent to reach every private and public practice that makes housing more difficult to obtain on prohibited grounds," *United States v. Branella,* 972 F. Supp. 294, 302 (D.N.J. 1997), the Court is not convinced that Tenafly's denial of permission for the use of its municipal property was a public practice which directly made unavailable or denied housing. Although Plaintiffs argue to the contrary, none of the cases they cited are analogous to this dispute, since none of those cases held a denied request for the non-housing use of municipal property to be an act which by extension "otherwise made unavailable or denied" housing.

Instead, every one of the cited decisions involved some action by individuals or governmental units which directly affected the availability of housing, by imposing impermissible terms on either its proposed location, the required permissions for its construction, its acquisition, or the demographic composition of its residents. *See, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982) (prohibited housing steering practices); *Hack v. President and Fellows of Yale College,* 237 F.3d 81 (2d Cir. 2000) (claim that mandatory co-educational on-campus

housing policy made dorms "otherwise unavailable" to those with conflicting religious beliefs); *Huntington,* 844 F.2d 926 (discriminatory zoning practice); *United States v. Yonkers Board of Ed.,* 837 F.2d 1181 (2d Cir. 1987) (decision to confine subsidized housing to minority areas); *Easter Seal Society of New Jersey v. Tp. of North Bergen,* 798 F. Supp. 228 (D.N.J. 1992) (discrimination against housing for handicapped); *Woods v. Foster,* 884 F. Supp. 1169 (N.D. Ill. 1995) (residence in homeless shelter "otherwise made unavailable" by pattern of sexual harassment by supervisors).

In addition to the foregoing cases, Plaintiffs place great weight on the Second Circuit's decision in *LeBlanc-Sternberg v. Fletcher,* 67 F.3d 412 (2d Cir. 1995). In that case, residents of Airmont, New York, voted to incorporate their community as a village, so that they could wrest control of zoning ordinances away from the Town of Ramapo. *LeBlanc-Sternberg,* 67 F.3d at 418. The residents' express desire in so doing was to prohibit the construction of home synagogues, which were at that time permitted by the Town zoning ordinance. *Id.* In modifying the ordinance, the proponents of incorporation wished to prevent an influx of Orthodox Jews into Airmont. *Id.*

Plaintiffs argue that according to *LeBlanc-Sternberg,* a group of Orthodox Jews have standing to bring an FHA claim when a discriminatory municipal decision has a chilling effect on their desire to move into a community. Because the contention is too broad, the Court disagrees. Standing under the FHA is not created by a discriminatory decision that impacts a plaintiff's desire to move to a community, but instead by a decision which impacts their ability to do so.

Appendix B

In *LeBlanc-Sternberg,* the impermissible governmental act was a discriminatory change to municipal zoning regulations, which not only chilled the plaintiffs desire to move into a community, but also denied them a previously permitted religious use of their own homes. Such a decision necessarily had the impermissible effect of "making unavailable or denying" housing, since Plaintiffs could no longer construct the homes they desired (i.e. those with synagogues).

The circumstances in Tenafly are distinct. Although Plaintiffs do contend that the denial of the *eruv* application would have a direct impact on the availability of housing to those Orthodox Jews who require an *eruv* to lift, carry, and push on the Sabbath, the Court disagrees. Instead, the Court concludes from Plaintiffs' own statements and conduct that the absence of an *eruv* merely impacts on the *desirability* of housing in Tenafly. Despite Plaintiffs contentions that they can not live in an area without an *eruv, (see, e.g.,* Brenner Cert ¶ 6), and that the absence of the "necessity" of an *eruv* in a given area makes the housing in that area "otherwise unavailable" to them on the basis of their religion, Plaintiffs own conduct and testimony mandate a different conclusion.

In practical terms, according to the testimony of an *eruv* proponent, Observant Jews may live in a town without an eruv. (Agus Tr. 122:11-12). This is supported not only by Mr. Agus's words, but by the conduct of Chaim and Yosifa Book, Stefanie Dardick Gotlieb and Erez Gotlieb, and others. (Yosifa Book Cert. ¶ 2; Stefanie Dardick Gotlieb Cert. ¶ 2). All of these individuals moved to Tenafly prior to the construction of an *eruv,* and all of these individuals were presumably able to go about the practice of their religion

without an *eruv,* so long as they did not lift, carry, or push on the Sabbath.

Although the evidence demonstrates that Plaintiffs have lived in and could continue to live in Tenafly without an *eruv,* the Court does not doubt Mr. Agus's assertion that an *eruv* affords those who believe in it a significant enhancement to the practice of their religion. (Agus Tr. 122:11-12). Even Councilman Sullivan conceded that the absence of an *eruv* would adversely impact the lives of those who believed in it. (Sullivan Tr. 16:24). It is undisputed that life without an *eruv* is more difficult than life with an *eruv,* because without an *eruv* Plaintiffs' own faith prohibits them from lifting, carrying, or pushing on the Sabbath. That sincerely held belief effectively means that without an *eruv,* Plaintiffs can not carry their young children to worship services, or carry a picnic basket to the local park. Unless Plaintiffs are able to construct an *eruv,* their faith teaches them that they must abide by those faith-imposed burdens. If they are able to construct an *eruv* their faith then lifts those burdens. Unburdened, the practice of their religion is necessarily enhanced, because they have greater freedom of movement on the Sabbath.

Given these competing obligations of faith, Plaintiffs would have the Court, using the FHA as a mechanism, compel the Borough to open its right-of-way, so that they could construct their religious demarcation, and allow their faith to lift the burdens that their has faith imposed on them. This request is not one to make Tenafly more available to a religious group, but instead to make houses within the boundary of the *eruv* more appealing to that religious group,

since Plaintiffs' faith would permit them to live in those houses free of the burdens that their faith imposes on them on the Sabbath. The Court does not agree that denial of such a request, even if made for unconstitutional reasons, would make that housing "less available" to Plaintiffs. The Court reaches this conclusion in part because, even if the Tenafly *eruv* were dismantled tomorrow, *eruv*-observant Jews who presently live outside of Tenafly would be just as free to purchase homes in Tenafly as *eruv*-observant Jews were to purchase homes in Tenafly prior to the *eruv's* construction. While those *eruv*-observant Jews would admittedly be less inclined to move to Tenafly without an *eruv,* they would still be just as free to move to Tenafly if they wished.

Noting that the FHA is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, *Southend Neighborhood Improvement Assoc. v. County of St. Clair,* 743 F.2d 1207, 1209-10 (7th Cir. 1984), Plaintiffs have failed to demonstrate that declining to make an area a more appealing choice for a religious minority, even if done for discriminatory reasons, is an FHA violation. Although Plaintiffs believe that unfettered access to the right-of-way is a requirement for the free exercise of their religion, and although Plaintiffs have indicated that they do not wish to remain in Tenafly without that access, the Court can not conclude that denial of access to a public right-of-way for the private construction of a religious installation "otherwise makes unavailable or denies" housing, even if that housing is now less appealing to a religious group than it once had the potential to be. To conclude otherwise would be to create an FHA claim in every circumstance where a religious group is denied a request to use municipal property to make an

area more appealing for the private practice of their religion. While discriminatory denials of such requests on the basis of religion can and should result in Free Exercise claims, the Court has not been presented with any evidence that Congress intended the FHA to overlap every Free Exercise claim that might impact on a person's desire to move to a given area.[31]

The Court is mindful that generally, courts ought to be more reluctant to grant FHA relief when asked to compel a defendant to take affirmative step to ensure integration, than when asked to enjoin a defendant from interfering with a plaintiff's private conduct in support of integration. *Arlington Heights,* 558 F.2d at 1283. "To require a defendant to . . . utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy." *Id.* In this case, the Borough of Tenafly did not reach out to burden Plaintiffs' housing choices, but instead declined to grant permission for a private use of Borough property. While the Court does find that this denial of the *eruv* application undoubtedly made housing in Tenafly less attractive to Plaintiffs, the Court concludes that the FHA does not impose on a municipality

31. Any contrary conclusion raises the prospect that the FHA might swallow the Free Exercise clause whole, for presumably any housing located in a municipality that trampled on a religious group's Free Exercise rights would become *per se* less attractive to members of that religious group. By application of this reasoning, in the oft-cited Free Exercise case of *Church of the Lukumi Babalu Aye v. Hialeah,* members of the santeria faith could have brought FHA claims against the City of Hialeah, for when the city's unconstitutional ordinances curtailed their faith, they would have been forced to live elsewhere in order to fully practice their religion.

the affirmative obligation to honor all requests for the use of its right-of-way that might make a community more attractive to a given religious group.

The Court simply does not see how a decision which declines to alter the *status quo* and fails to make an area more attractive to a religious group somehow makes the housing in that area less available or more difficult to obtain. Even if the decision of the Borough Council was discriminatory, the Court can not conclude that it "otherwise made unavailable or denied" housing, and that therefore it was a "housing practice" sufficient to establish standing under the FHA. Accordingly, the Court concludes that Plaintiffs lack standing pursuant to 42 U.S.C. § 3613, and therefore do not have a likelihood of success on the merits of their FHA claims.

III. CONCLUSION

Because of the publicity surrounding this dispute, the tireless efforts of the parties, and most importantly the fundamental interests at stake in this litigation, the Court has painstakingly set forth both the direct events and external circumstances that lead to the Borough of Tenafly's decision to deny Plaintiffs' request to maintain *lechis* on Verizon's telephone poles in the municipality's right-of-way.

The contentiousness generated by Plaintiffs' application is clearly reflected in the comments of the public speakers at the numerous Borough Hearings and Work Sessions. Those comments included a broad range of opinions, including statements that undeniably reflected the biases and prejudices

of those who made them. Equally true, however, is the fact that many of those comments reflected legitimate concerns about the propriety of committing public property permanently for a religious purpose, and the apparent entanglement with religion that might result.

This conflict over the use to which public property should be put is evident in the candid explanations given by the members of the Borough Council, both in their affidavits and in their live testimony. It is obvious to the Court that the Council was faced with a novel request that generated considerable public concerns about possible constitutional violations, and presented a range of other public policy issues.

Unfortunately, it is apparent to the Court that in addition to the aforementioned concerns about how municipal property should be used, the Borough Council also weighed some improvident and constitutionally impermissible factors when making their ultimate decision. While the Court is convinced that the Borough Council did not act out of some deep seated anti-Semitism or hatred for religion in general, even if some of the motives for their denial were objectionable the Court concludes that the Borough Council did not violate Plaintiffs' rights, either constitutional or statutory, for the following reasons.

First, after an examination of all the evidence, the Court must conclude that the utility poles and the right-of-way are not public forums, or even limited public forums for speech. Since they were never used for public discourse, and were never committed to that purpose, the utility poles and the right-of-way are undoubtedly a nonpublic forum. Given such

a nonpublic forum, absent any evidence that others were granted comparable access while Plaintiffs were denied it, or that Plaintiffs were denied access they otherwise would have received based solely on their viewpoint, regardless of the Council's motive the Court holds that a decision to enforce a reasonable, neutral access restriction of general applicability can not have amounted to viewpoint discrimination.

Second, the Court is convinced that the fundamental reason animating the Borough Council's decision was its concern that public property should not be permanently allocated to a religious purpose. In making this decision, the Borough Council was not targeting the Orthodox Jews, but was instead targeting permanent religious installations on property to which the public typically does not have a right of access. Under the circumstances of this case, this decision as to how municipal property should be used was ultimately a legitimate legislative decision by an elected representative body whose responsibility it was to make just this kind of decision, and who acted out of a compelling interest. Since the Borough Council's decision was narrowly tailored to prohibit only conduct that might generate the appearance of an entanglement between church and state, no constitutional infirmities resulted, and there is no cause for a court to second guess such a decision.

Absent a likelihood of success on their underlying constitutional claims, the Court concludes that Plaintiffs' are also unlikely to succeed on their 42 U.S.C. §§ 1983 and 1985 claims. For the reasons discussed at length in the Opinion, Plaintiffs have similarly failed to demonstrate a likelihood

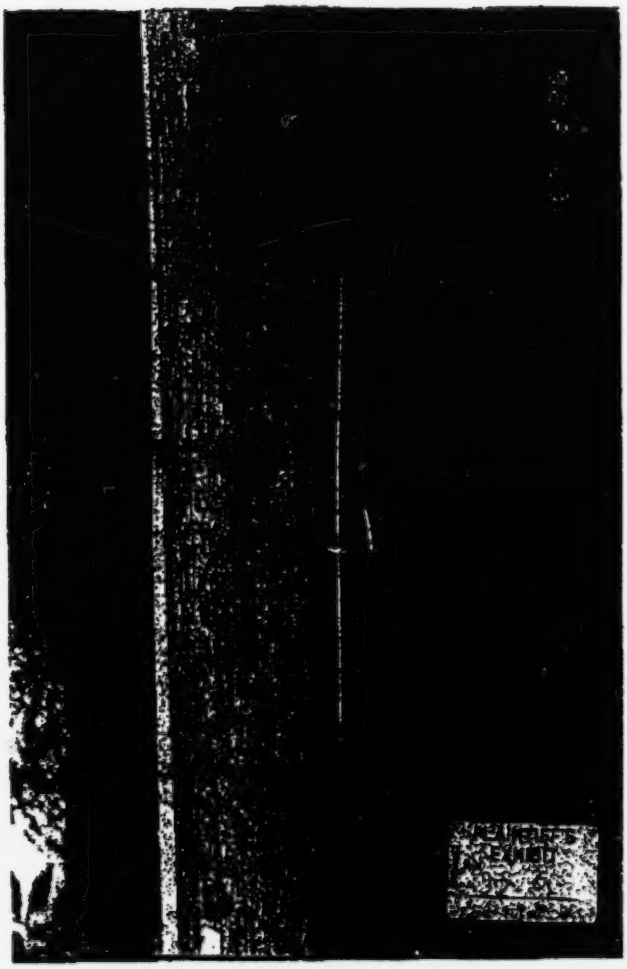
of success on their remaining FHA claims. Since Plaintiffs have failed to demonstrate that they are likely to eventually succeed on any of their claims, the application for a preliminary injunction is **denied** and the temporary restraining order is **dissolved**.

An appropriate Order follows.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Appendix B

Appendix A

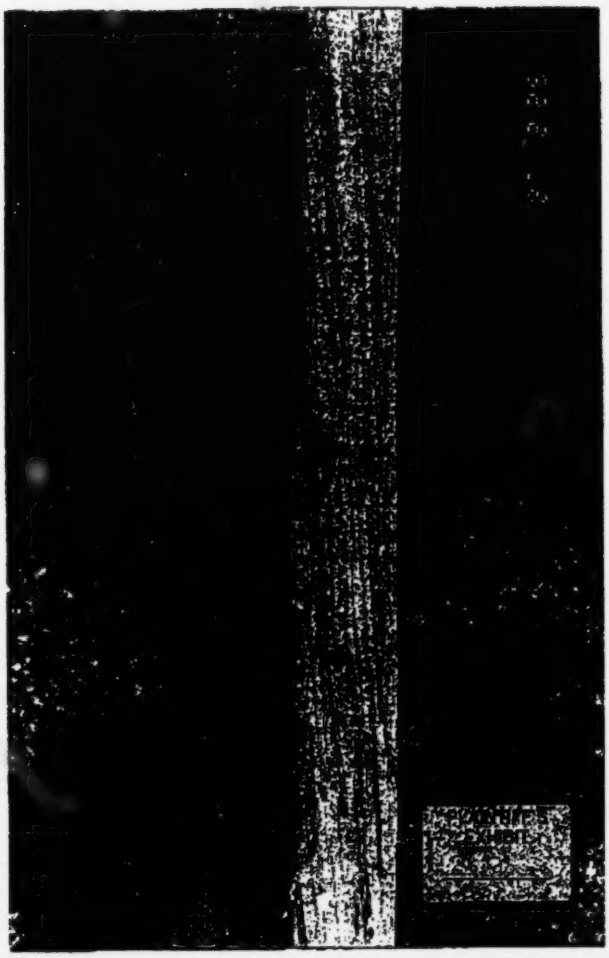


Lechi, attached to
Verizon Telephone Pole in Borough of Tenafly

Plaintiffs' Ex. 35(a)

Appendix B

Appendix B

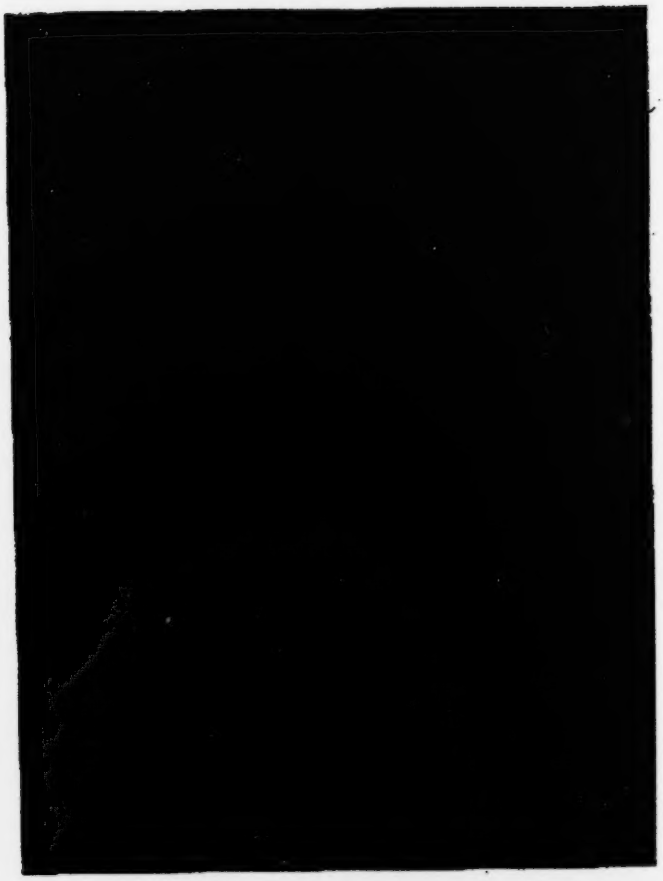


Verizon telephone ground wire, attached to
Verizon Telephone Pole in Borough of Tenafly

Plaintiffs' Ex. 36(a)

Appendix B

Appendix C



Tenafly Chamber of Commerce holiday display,
attached to Verizon Utility Pole in Borough of Tenafly

Nelkin Aff. Ex. B

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. CIV. 00 - 6051 (WGB)

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Plaintiffs,

v.

The BOROUGH OF TENAFLY, Ann Moscovitz, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

ORDER

This matter having come before the Court on Plaintiffs' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65; and

The Court having considered the submissions of the parties and of *amicus curiae*; and

Appendix B

The Court having conducted an evidentiary hearing during April and May of 2001; and

The Court having heard oral argument on July 19, 2001; and

For the reasons set forth in the Court's Opinion issued this day; and

For good cause shown;

It is on this 9th day of August, 2001 ORDERED that Plaintiffs' motion for a preliminary injunction is **denied**; and

IT IS FURTHER ORDERED that the temporary restraints currently in effect are **dissolved**.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 20, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3301

TENAFLY ERUV ASSOCIATION, INC.; CHAIM BOOK; YOSIFA BOOK; STEPHANIE DARDICK GOTTLIEB; STEPHEN BRENNER,

Appellants

v.

THE BOROUGH OF TENAFLY; ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly; CHARLES LIPSON; MARTHA B KERGE; RICHARD WILSON; ARTHUR PECK; JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES and SMITH, *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the Court *en banc*, the petition for rehearing is DENIED.

By the Court

s/ Thomas L. Ambro, J.
Circuit Judge

Dated: 11/20/02

02-1536

~~No. 02-1516~~

Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, Individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, Individually and in their ofiicial capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF CHAIM BOOK, YOSIFA BOOK AND STEPHEN BRENNER

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14pp

TABLE OF CONTENTS

Page

STATEMENT 1

REASONS TO DENY THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE MEANING OF "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND, IN ANY EVENT, THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE 5

II. LAWS THAT DISCRIMINATE AGAINST RELIGIOUS CONDUCT ARE UNCONSTITUTIONAL REGARDLESS OF THEIR IMPACT 7

III. SINCE ACCEPTANCE OF AN ERUV DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, IT DOES NOT JUSTIFY THE DISCRIMINATORY DEMAND THAT THE ERUV BE REMOVED 9

IV. THE DECISION BELOW IS NOT A FINAL JUDGMENT 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES ***Page(s)***

ACLU of New Jersey v. City of Long Branch, 670 F. Supp.1293 (D.N.J. 1987) 9

Brotherhood of Locomotive Firemen v. Gangor & Aroostock R. Co., 389 U.S. 327, 328 (1967).....10

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....4, 6, 7, 8

Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).....6, 7

Fraternal Order of Police Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) 4

Good News Club v. Milford Cent. School, 533 U.S. 98 (2001) 8

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1986) 4

Smith v. Community Bd. No. 14, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd*, 518 N.Y.S.2d 356 (2d Dep't 1987) 9

United States v. Virginia, 518 U.S. 515 (1996) 10

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 10

OTHER AUTHORITIES

ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 10

STATEMENT

This case concerns the refusal by the Borough of Tenafly to allow its Orthodox Jewish residents to attach to telephone poles 183 plastic strips that are identical in appearance to the coverings on ordinary ground wires affixed to utility poles throughout the Borough. The plastic strips (called *lechis* in Hebrew) are components of an *eruv* – a ceremonial demarcation of an area within which Orthodox Jews are permitted to carry and to push carriages, strollers and wheelchairs on the Sabbath and on Yom Kippur. "Without an *eruv* Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath." Pet. App. 4a.

Orthodox Jewish communities in dozens of metropolitan districts in the United States, including Washington, D.C., have obtained from local governments the ceremonial proclamation required by Jewish Ritual Law for the creation of an *eruv* and permission to affix to utility poles similar strips of plastic, wood or other material. In Tenafly, however, the request aroused significant resistance from the Mayor, some members of the Borough Council, and various Tenafly residents.

At a public meeting of the Borough Council held in July 1999, vehement objections to a potential *eruv* were expressed by residents who did not want Orthodox Jews to move into the neighborhood. Pet. App. 5a-6a; 73a-84a. Although the Borough's Attorney was present at the meeting, neither he nor any other speaker mentioned Ordinance 691. That provision was first invoked in late 2000, after the plastic strips for the *eruv* had been attached to

telephone poles with the permission of Verizon, the local telephone company that owned the poles, and with the assistance of Cablevision, a company that has provided personnel to assist in creating an *eruv* in various other communities in the United States.

In response to a formal application, filed by the respondents in November 2000, to retain the plastic strips that comprise the *eruv,* the Tenafly Borough Council held two public hearings during which proponents and opponents of the *eruv* spoke. During the meeting of December 12, 2000, a Councilman noted that "no ordinance, no resolution . . . says that you cannot hang something from a utility pole." Pet. App. 8a-9a.

The Council voted 5-to-0 to order removal of the *eruv* on December 13, 2000, and this injunction action was instituted two days thereafter. A four-day evidentiary hearing on the respondents' motion for a preliminary injunction was held in April and May 2001. The principal subject explored at the hearing was the motivation of the members of the Council who voted to deny permission for the *eruv.* Evidence was also introduced regarding Tenafly's enforcement of Ordinance 691. The court of appeals summarized the enforcement record as follows (Pet. App. 2a-3a):

> Although Ordinance 691 does not allow Borough officials to make exceptions on a case-by-case basis, in practice they have often done so. House number signs nailed to utility poles in plain view are frequently left in place. Local churches are tacitly

> allowed to post permanent directional signs bearing crosses on municipal property. Lost animal signs and other private postings often remain undisturbed by Borough officials. Orange ribbons were affixed to utility poles "for a lengthy period of time" by supporters of the local high school during a protracted controversy over school regionalization, but Borough officials made no effort to remove them. Every year, officials in the small community permit the local Chamber of Commerce to affix holiday displays to the Borough's utility poles for approximately six weeks during the Christmas holiday season. Red ribbons, wreaths, and seasonal holiday lights are attached to the Borough's utility poles as part of these displays.

The district court concluded that while several of the members of the Borough Council voted to deny the respondents' application "because of the perceived divisiveness and exclusivity that an *eruv* would generate in Tenafly," their votes were "not affected in any way by any animosity or prejudice against Orthodox Judaism." Pet. App. 147a. The district court held that Ordinance 691 was "a reasonable, facially neutral restriction on access to the right-of-way, that as applied did not have the effect of discriminating against [the respondents'] viewpoint." Pet. App. 141a-142a. Accordingly, the district court denied respondents' motion for a preliminary injunction against removal of the *eruv*.

The court of appeals reversed and directed the entry of a preliminary injunction. The court held "that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of" this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), and the Third Circuit's decision in *Fraternal Order of Police Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d Cir. 1999). The court said (Pet. App. 36a):

> Apart from their religious nature, the *lechis* are comparable to the postings the Borough has left in place. If anything, the *lechis* are less of a problem because they are so unobtrusive; even observant Jews are often unable to distinguish them from ordinary utility wires.

On this basis, the court evaluated Tenafly's order directing removal of the *eruv* under the "strict scrutiny" standard. It rejected Tenafly's reliance on *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1986), on the ground that respondents were "not asking for preferential treatment" but only to have religious observance treated equally with secularly motivated conduct. Pet. App. 38a-40a. The court of appeals also rejected Tenafly's claim that removal of the *eruv* would not "substantially burden" the respondents' religious observance. The court said: "Under *Smith* and *Lukumi,* however, there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. And the court of appeals held that it would be impermissible to distinguish, as Tenafly

had argued, between "mandatory" and "optional" religious practices. Pet. App. 43a-45a.

Finally, the court of appeals held that Tenafly could not constitutionally justify prohibition of the *eruv* on the ground that permitting the *eruv* would appear to be an endorsement of Orthodox Judaism in violation of the Establishment Clause. The court said: "[B]ecause the *eruv* is maintained solely with private funds and because allowing the *lechis* to remain in place would represent neutral rather than preferential treatment of religiously motivated conduct, no reasonable informed observer would believe the Borough is 'affirmatively sponsor[ing]' an Orthodox Jewish practice." Pet. App. 56a.

REASONS TO DENY THE WRIT

I

THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE MEANING OF "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND, IN ANY EVENT, THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE

The Third Circuit's careful opinion, which rejected various constitutional and statutory claims made by the respondents (see Pet. App. 15a-16a n.13; 16a-30a) while upholding their Free Exercise of Religion claim, was based on a painstaking examination of the record and is obviously very fact-specific. The court of appeals held that *on the record made in this case* Tenafly's order to remove the 183

plastic strips that comprise the *eruv* amounted to the kind of "selective, discretionary application of Ordinance 691" that violated the standard articulated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

In their effort to convert this narrow ruling into a decision that would warrant certiorari, the petitioners have seized on language in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), that described the unemployment-compensation cases in which this Court, before the *Smith* decision, had sustained claims under the Free Exercise Clause of the First Amendment. The Court said in *Smith* that the unemployment-compensation cases were instances in which the law prescribed "a system of individual exemptions" and that "system" had not included "religious hardship." 494 U.S. at 884.

This description of a particular string of decisions of this Court did not create a doctrinal category for the determination of future cases. This Court did not say in its *Smith* opinion that only if there is "a system of individual exemptions" can a First Amendment claim be sustained. The petitioners' effort to convert descriptive language in *Smith* into a doctrine over which the federal courts of appeals differ (Pet. 10-18) is made of whole cloth. The court of appeals did not invoke the term "system of individual exemptions" anywhere in its opinion. It made no reference to any split among the circuits over such a doctrine. Other than in the petition for certiorari in this case – authored by professors of law at two New York law schools – there has been no recognition heretofore of any constitutional issue that turns on a "system of individual exemptions."

Moreover, this case does not involve any "system of individual exemptions." Tenafly's position in the courts below was that it granted no exemptions whatever, not that the law authorized "individual exemptions." Brief for Appellees, 3d Cir., No. 01-3301, p. 49. The record of this case establishes that Ordinance 691 was totally ignored during the first year-and-a-half of the controversy over the Tenafly *eruv*. It was discovered as an afterthought and used by the Tenafly Borough Council, in December 2000, as a convenient pretext for demanding that the otherwise unobtrusive plastic strips be removed. The court of appeals' decision was based on a history of extensive nonenforcement of Ordinance 691 in contexts other than the use of telephone poles for the benefit of the Orthodox Jewish residents. See the recitation quoted at pp. 2-3, *supra*. Pet. App. 3a. Hence the primary "Question Presented" in the petition is not actually presented by the facts of this case or by the opinion of the court below.

II

LAWS THAT DISCRIMINATE AGAINST RELIGIOUS CONDUCT ARE UNCONSTITUTIONAL REGARDLESS OF THEIR IMPACT

There is no conflict among the federal courts of appeal over the primary proposition expressed by the Third Circuit – *i.e.* that "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. The Third Circuit went on to disapprove of the approach of some

courts of appeals that *have* inquired into the "centrality of religious practices" (Pet. App. 42a n.31) in cases that did not involve discrimination against religiously motivated conduct. The petitioners assert that these courts would require proof of a substantial burden "even where *Lukumi* applies." Pet. 22. But no reported decision other than the Third Circuit's ruling in this case has addressed that question.

Moreover, the Third Circuit is plainly correct in its reading of the *Lukumi* decision, which did not turn on proof of a "substantial burden." This Court's subsequent decision in *Good News Club v. Milford Cent. School,* 533 U.S. 98 (2001), confirmed the principle that discrimination against religious conduct is constitutionally prohibited even without proof that religious observance has been "substantially burdened."

Finally, if "substantial burden" did have to be shown, the undisputed fact that removal of the *eruv* prevents "Orthodox Jews who have small children or are disabled . . . [from] attend[ing] synagogue on the Sabbath" (Pet. App. 4a) surely satisfies that standard.

III

SINCE ACCEPTANCE OF AN *ERUV* DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, IT DOES NOT JUSTIFY THE DISCRIMINATORY DEMAND THAT THE *ERUV* BE REMOVED

Petitioners' final claim is that this case raises the issue whether apprehension of an Establishment Clause violation is a compelling interest that justifies a municipality's restriction on a religious observance. It was undisputed in the district court, however, that by permitting Orthodox Jews to maintain an *eruv* at no public expense, a local government does not violate the Establishment Clause. *ACLU of New Jersey v. City of Long Branch,* 670 F. Supp. 1293 (D.N.J. 1987); *Smith v. Community Bd. No. 14,* 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd,* 518 N.Y.S.2d 356 (2d Dep't 1987); see Pet. App. 124a. Tenafly never claimed prior to the district court decision that permitting the *eruv* would be unconstitutional. Hence the alleged "split between the circuits" over this issue (Pet. 24-27) is not presented by the record of this case.

IV

THE DECISION BELOW IS NOT A FINAL JUDGMENT

A final prudential reason to deny the petition for a writ of certiorari in this case is that the ruling below resolved only the question whether a preliminary injunction should issue. This Court ordinarily reviews final judgments and

does not ordinarily consider issues presented at an interlocutory stage of federal litigation. See *Brotherhood of Locomotive Firemen v. Gangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); *United States v. Virginia*, 518 U.S. 515 (1996); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Robert L. Stern, et al.*, Supreme Court Practice, pp. 258-261 (8th Ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-1536

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IN THE

Supreme Court of the United States

The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDIK GOTLIEB and STEPHEN BRENNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TENAFLY ERUV ASSOCIATION, INC. AND STEFANIE DARDIK GOTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Whether the court of appeals correctly ordered the entry of a preliminary injunction where it found that petitioners violated respondents' First Amendment Free Exercise rights under *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), in ordering the removal of plastic strips that constitute part of an eruv from certain telephone poles, thereby selectively applying a local ordinance which on its face prohibits affixing anything to telephone poles but which petitioners had permitted numerous others to violate by attaching things to the poles.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there are no parent companies, subsidiaries or affiliates of Tenafly Eruv Association, Inc. that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	2
Background of the Litigation	2
Course of Proceedings and Disposition Below	4
REASONS TO DENY THE WRIT	6
I. THE DECISION BELOW IS NOT A FINAL JUDGMENT	6
II. THERE IS NO SPLIT IN THE CIRCUITS OVER A "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE	6
III. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING THE PROPOSITION THAT GOVERNMENT ACTION THAT DISCRIMINATES AGAINST RELIGIOUS CONDUCT IS UNCONSTITUTIONAL REGARDLESS OF WHETHER IT IMPOSES A SUBSTANTIAL BURDEN ON SUCH CONDUCT	11

TABLE OF CONTENTS—Continued

Page

IV. THERE IS NO SPLIT IN THE CIRCUITS ON WHETHER PERMITTING AN ERUV VIOLATES THE ESTABLISHMENT CLAUSE, AND THERE IS NOTHING IN THE RECORD TO SUPPORT PETITIONERS' CLAIM THAT VIOLATING THE ESTABLISHMENT CLAUSE WAS EVER A CONCERN, LET ALONE A VALID CONCERN 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES — Page

ACLU of New Jersey v. *City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987) 14
American Friends Service Comm. Corporation v. *Thornburgh*, 951 F.2d 957 (CA9 1991).. 10
Church of the Lukumi Babalu Aye v. *City of Hialeah*, 508 U.S. 520 (1993).....2, 5, 7, 10, 11, 12, 13
Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464 (CA8 1991) 10
Daniels v. *City of Arlington*, Texas, 246 F.3d 500 (CA5), *cert. denied*, 534 U.S. 951 (2001)..... 9
Employment Division v. *Smith*, 494 U.S. 872 (1990).....2, 6, 7, 10, 11, 12-13
Fraternal Order of Police v. *City of Newark*, 170 F.3d 359 (CA3), *cert. denied*, 528 U.S. 817 (1999).....5, 9-10
Good News Club v. *Milford Central School*, 533 U.S. 98 (2001)..... 12, 15
Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916) 6
Keeler v. *Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996)..... 8
Lamb's Chapel v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993)..... 14
Lemon v. Kurtzman, 403 U.S. 602 (1971) 15
Rader v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) 8
Rector of St. Bartholomew's Church v. *City of New York*, 914 F.2d 348 (CA2 1990), *cert. denied*, 499 U.S. 905 (1991) 9
Rosenberger v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) 14
Swanson v. *Guthrie Independent School District No. 1-L*, 135 F.3d 694 (CA10 1998)..... 10

TABLE OF AUTHORITIES—Continued

Page

Vandiver v. *Hardin County Board of Education*, 925 F.2d 927 (CA6 1991) 9

Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) 6

STATE CASES

First Covenant Church of Seattle v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) 8

Korean Buddhist Dae Won Sa Temple of Hawaii v. *Sullivan*, 953 P.2d 1315 (Haw. 1998) 8

Smith v. *Community Board No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd*, 518 N.Y.S.2d 356 (2d Dep't 1987) 14

IN THE

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The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDIK GOTLIEB and STEPHEN BRENNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TENAFLY ERUV ASSOCIATION, INC. AND STEFANIE DARDIK GOTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Tenafly Eruv Association, Inc. ("TEAI") and Stefanie Dardik Gotlieb request that this Court deny the petition for certiorari. The petition should be denied because: (1) it seeks review of a nonfinal order; (2) it does not present an issue on which the circuits have issued conflicting decisions; (3) the court of appeals' decision in this case is

grounded in a factbound application of well-established law; and (4) this case would be an exceptionally poor vehicle because the proper resolution of this case does not require the conciliation of inconsistent statements among the circuits. The Third Circuit's nonfinal order: (1) reversed the district court's denial of a motion for preliminary injunction, and (2) remanded the case back to the district court with directions to issue the preliminary injunction. In so doing, the court of appeals held that petitioners' "selective discretionary application" of a local ordinance when it ordered the removal of plastic strips affixed to telephone poles by a group of Orthodox Jews that constituted part of an eruv, violated well-established First Amendment principles of nondiscrimination enunciated by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993).

COUNTERSTATEMENT OF THE CASE

The court of appeals correctly directed the district court to enter the preliminary injunction and, in doing so, correctly relied upon and applied *Smith* and *Church of the Lukumi*, under which a government actor violates the First Amendment if it chooses to enforce even a neutral law selectively against a religious group. The specific factual record in this case reveals that petitioners selectively enforced an ordinance governing use of the telephone poles in the public right of way against a group of Orthodox Jews when they ordered respondent TEAI to remove plastic strips from telephone poles after they had previously permitted numerous other groups to attach things to the poles or otherwise place things in the public right of way.

Background of the Litigation

The eruv, a ritual boundary within which Orthodox Jews may carry things as well as push wheelchairs and strollers on

the Sabbath, had been established in September, 2000. It consisted of existing horizontal telephone wires and plastic strips, known as "lechis," which were attached to certain of the telephone poles. The lechis are identical to the strips used by Verizon to cover ground wires. Pet. App. at 4a.

At that time, neither the TEAI nor the members of the Borough Council believed that a Borough ordinance governed or that Borough approval was necessary for the placement of the lechis. Indeed, in November, 2000, the attorney for the TEAI wrote a letter to the Borough attorney which stated, in part: "I also appreciate your advice that the Borough has no specific ordinance covering this matter or any particular format for the Eruv Association to follow in submitting its request . . ." Pet. App. at 8a. And, as late as the meeting on December 12, 2000, at which the Borough Council voted to require that the eruv be taken down, one member of the council stated: "To the best of my knowledge—and this can be confirmed,—there is no ordinance, no resolution that says that you cannot hang something from a utility pole, to the best of my knowledge, and please correct me if I'm wrong, there's no ordinance." Pet. App. at 8a-9a; Joint Appendix ("JA") at A313.[1] At that point, for the first time, the Mayor referred to Ordinance 691 but, even then, there was no suggestion that the ordinance absolutely prohibited affixing the lechis to the poles. Pet. App. at 9a. In fact, the Council permitted TEAI to file its request to leave the eruv in place, considered the request in several closed and open public meetings, and in their discretion voted to deny it.

Nor was there any suggestion that in voting to approve the eruv, the Borough Council would be violating the Establishment Clause of the First Amendment. To the

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[1] The Joint Appendix was submitted by Petitioners and Respondents to the Third Circuit in connection with the appeal of the district court's decision.

contrary, the Borough Attorney publicly stated at the meeting of December 12, 2000, that he had advised the Council that, pursuant to a prior decision of the United States District Court for the District of New Jersey directly on point, approval of the eruv would not be a violation of the Establishment Clause. JA at A308-09.

Prior to voting to require that the eruv be removed, the Borough Council had either authorized or permitted the use of the poles, or the Borough right of way, which is also governed by Ordinance 691, for a variety of religious and secular purposes. Each year, the local Chamber of Commerce is permitted to put holiday decorations on the poles. Pet. App. at 3a. Opponents of a school regionalization plan were permitted to place orange ribbons on the poles. *Id.* A private company was allowed to affix radio transmitters to the poles. JA at A344-58, A426. Residents were permitted to post house numbers, garage sale signs and lost dog signs on the poles. Other uses of the Borough right of way were routinely permitted: residents could symbolically "rent" for $1 the curbstones and sidewalk for sprinklers, wells and fences. Pet. App. at 3a. In addition, churches had been authorized to put directional signs in the right of way, some of which have religious symbols and times of worship. *Id.* There is no evidence that the Borough Council had ever denied an application under Ordinance 691. In addition, the Borough has permitted the display of a creche and a menorah in a public park, sponsored an afternoon with Santa in Borough Hall and an Easter Egg hunt on the lawn of Borough Hall, and permitted a Good Friday march through the streets of the Borough. JA at A425, A432-33, A435-36, A444-45, A871.

Course of Proceedings and Disposition Below

This lawsuit was commenced after the Borough Council voted to require that the eruv be removed. The district court granted respondents' application for a temporary restraining

order but, after a hearing, denied the motion for a preliminary injunction. Pet. App. at 9a-10a. The district court's denial was based, inter alia, on the ground that Ordinance 691 was clear on its face and prohibited placing anything on the poles. Pet. App. at 11a, 142a. The district court also found that the Borough's desire to avoid violating the Establishment Clause was a "compelling state interest" that justified the Council's action. Pet. App. at 148a-156a, 166a.

The Third Circuit unanimously reversed and directed the entry of the preliminary injunction. Pet. App. at 59a. The Borough's petition for rehearing or rehearing en banc was denied. Pet. App. at 173a-174a. The court, observing that "the Borough has allowed private citizens to affix various materials to its utility poles," Pet. App at 36a, held that:

> the Borough's selective, discretionary application of Ordinance 691 against the lechis violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* [v. *City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999),] because it "devalues" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than non religious reasons," and thus "singles out" the plaintiffs' religiously motivated conduct for discriminatory treatment, *Lukumi*, 508 U.S. at 537; *Fraternal Order of Police*, 170 F. 3d at 364-365. Pet. App. at 37a.

With respect to the Establishment Clause rationale adopted by the district court, the court of appeals exhaustively analyzed this Court's Establishment Clause rulings and held that action of the Borough Council approving the eruv would not have violated the Establishment Clause and, afterthought or not, concern of such a violation could not, therefore, have been a "compelling state interest." Pet. App. at 46a-57a. The court based its conclusion in this regard on the unique facts of this case. Pet. App. at 54a-55a.

REASONS TO DENY THE WRIT

I. THE DECISION BELOW IS NOT A FINAL JUDGMENT

The petition for a writ of certiorari should be denied because the ruling below is a nonfinal order that resolved only the question whether a preliminary injunction should issue. Except in "extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). This case is not so "extraordinary" or of such public importance to warrant deviation from this Court's normal appellate practice. Rather, this case is a straightforward application of Supreme Court precedent interpreting the Free Exercise clause to the specific facts of this case.

II. THERE IS NO SPLIT IN THE CIRCUITS OVER A "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE

Contrary to petitioners' assertions, the Third Circuit's factually driven decision is a logical, straight-forward and faithful application of the legal principles articulated in *Smith* and *Church of the Lukumi* and, as such, does not warrant Supreme Court review. In an attempt to convince this Court that there are "special and important reasons" warranting certiorari, petitioners have manufactured a non-existent dispute among the circuit courts concerning the interpretation of a phrase embedded in the *Smith* decision—"system of independent exemptions"—and then tried to portray the Third Circuit's decision as a radical interpretation of this phrase. This argument is nothing more than a straw man erected by petitioners that has no relevance to the Third Circuit's decision.

In *Smith*, this Court determined that the Free Exercise Clause is not implicated, and strict scrutiny is not appropriate, where the statute or law in question is "neutral," "generally applicable," and only burdens religion incidentally. 494 U.S. at 879. In reaching this decision, the Court acknowledged that in three previous unemployment compensation cases it had held that strict scrutiny was appropriate because the state had in place a system of individual exemptions that accommodated secular hardships but not "religious hardship." *Id.* at 884. Three years later, in *Church of the Lukumi*, this Court determined that it was appropriate to apply strict scrutiny to the four ordinances in question because it was clear that these ordinances were neither "neutral" nor "generally applicable" but instead "gerrymandered" to only target and affect the Santeria religion. *Church of the Lukumi*, 508 U.S. at 534-545. In determining that animal slaughter ordinances were neither "neutral" nor "generally applicable," the Court looked not only at the text of the ordinances, but also at their application, stating that "apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. Having analyzed how these ordinances were applied, the Court determined that "religious practice [was] being singled out for discriminatory treatment" and strict scrutiny was required in part because the ordinances "require[d] an evaluation of the particular justification for the killing [and] represents a system of individualized governmental assessment of the reasons for the relevant conduct. . . [and] respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537. Neither the *Smith* nor *Church of the Lukumi* decisions were based upon the presence of "a system of individual exemptions" or a "system of individualized governmental assessments," and neither purported to create an absolute rule or test that must be satisfied in order to sustain a cause of action brought under the Free Exercise Clause.

Since this Court decided *Church of the Lukumi*, there has been no confusion, disagreement or split among the courts of appeals concerning what constitutes a "system of individual exemptions," or even "a system of individualized governmental assessments." Neither the Third Circuit nor any of the numerous courts whose decisions are cited by petitioners in support of their contention that there is widespread disagreement even mention, let alone recognize or consider, any confusion, disagreement or split. Pet. at 10-18. In fact, in many cases cited by petitioners, including the Third Circuit's opinion in this case, the court does not mention the phrase "system of individual exemptions" or consider whether such a system exists.

Furthermore, an analysis of the law proves that petitioners' theories concerning a "system of individual exemptions" are erroneous, unsubstantiated and arbitrary. Petitioners first claim that "several courts have held that a system of individual exemptions exists only where a statute confers discretion on a governmental official or officials to make a case-specific determination under the general terms of the law." Pet. at 12. However, not one of the four cases cited supports this position. Each of these cases simply concludes that the laws in question were not "neutral" or "generally applicable" because they were enforced in a discretionary manner either due to the explicit language of the law or how that law had been interpreted by government officials to the disadvantage of religious interests or parties. *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992); *Korean Buddhist Dae Won Sa Temple of Hawaii* v. *Sullivan*, 953 P.2d 1315 (Haw. 1998); *Keeler* v. *Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996); *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). Not one of these cases attempts to determine, let alone declare, in what other instances a "system of individual exemptions" may exist.

Petitioners also cite cases from the Second, Fifth and Sixth Circuits as support for the proposition that certain courts specifically reject the view that "a system of individual exemptions exists only where a statute confers discretion on a governmental official or officials to make a case specific determination under the general terms of the law." These cases also fail to provide any persuasive support for petitioner's contentions. Both the Second Circuit case—*Rector of St. Bartholomew's Church* v. *City of New York*, 914 F.2d 348 (CA2 1990), *cert. denied*, 499 U.S. 905 (1991)—and the Sixth Circuit case—*Vandiver* v. *Hardin County Bd. of Educ.*, 925 F.2d 927 (CA6 1991)—were decided before *Church of the Lukumi* and therefore are of little value in determining whether, and how, courts should consider and determine what constitutes a "system of individual exemptions." The Fifth Circuit case—*Daniels* v. *City of Arlington, Texas*, 246 F.3d 500 (CA5), *cert. denied*, 534 U.S. 951 (2001)—was decided after *Church of the Lukumi*, but does not even mention the phrase "system of individual exemptions" and attempts no analysis as to whether the statute in question was "neutral" and "generally applicable."

Petitioners next claim that the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No.12* v. *City of Newark*, 170 F.3d 359 (CA3) ("*FOP*"), *cert. denied*, 528 U.S. 817 (1999), stands for the proposition that "a system of individual exemptions exists where the law itself distinguishes between different categories of acts," and assert that the Eighth, Ninth, and Tenth Circuits have all rejected this view. Petitioners are wrong on both accounts.

In *FOP*, two devout Sunni Muslim police officers challenged their police department's no-beard policy, which allowed undercover police officers and police officers with medical conditions to grow beards but prevented the plaintiffs from maintaining the beards they had grown in accordance with their religious beliefs. 170 F.3d at 365. Contrary to

petitioners' assertions, the Third Circuit did not determine that strict scrutiny was appropriate simply because the no-beard regulation provided in its terms for an exemption for non-religious reasons. Instead, the Third Circuit concluded that strict scrutiny was appropriate because the department's creation of an exception for secularly motivated conduct coupled with its *specific refusal* to create an exception for religiously motivated conduct was an indication that this regulation was not "neutral" and "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.* The Third Circuit indicated that *Smith* and *Church of the Lukumi* did not require, or call for, an examination into whether a "system of individual exemptions" existed, but rather a determination of whether the law or regulation in question enables, or is used by, the government to decide that secular practices are more important than, and favored over, religious practices. *Id.*

Nor do the cases cited by petitioners conflict with *FOP*. First, both the Eighth Circuit case—*Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (CA8 1991)—and the Ninth Circuit case—*American Friends Service Comm. Corp.* v. *Thornburgh*, 951 F.2d 957 (CA9 1991)—were decided prior to *Church of the Lukumi* and therefore are of little value. Second, in the Tenth Circuit case—*Swanson* v. *Guthrie Independent School District No. 1-L*, 135 F.3d 694 (CA10 1998)—the court specifically refused to consider whether the regulation in question was neutral and generally applicable because the issue had not been raised below. *Id.* at 698. Because these are the very questions at issue here, *Swanson* is of no relevance to this case.

Finally, petitioners' hyperbolic claims that the Third Circuit's "radical" decision represents the "most extreme position" ever taken and "eviscerates *Smith's* touchstones of neutrality and general applicability" ignore the fact that this decision is a straightforward application of the principles of

Smith and *Church of the Lukumi*. After determining that Ordinance 691 was neutral and generally applicable on its face, the Third Circuit examined whether this ordinance had been uniformly applied, as *Church of the Lukumi* instructs. The Third Circuit, based on facts developed below, determined that petitioners had failed to enforce Ordinance 691—having authorized or allowed various secular and religious conduct to occur in contravention of the terms of the ordinance—but then applied Ordinance 691 to bar respondents' religiously motivated conduct. While petitioners contend that this determination was based on "isolated instances of non-uniform conduct," both the record and the Third Circuit's extremely thorough opinion reflect that this decision was based on numerous examples of non-enforcement of Ordinance 691, as indicated by the court of appeals' characterization of Ordinance 691 as "often dormant." Pet. App. at 37a.

The crux of the Third Circuit's decision is that Ordinance 691 was not neutral and generally applicable due to the selective manner in which the prohibition of the Ordinance was enforced. The Third Circuit's decision to apply strict scrutiny, in light of these findings, properly applies *Smith* and *Church of the Lukumi*, and there is no basis to grant the petition.

III. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING THE PROPOSITION THAT GOVERNMENT ACTION THAT DISCRIMINATES AGAINST RELIGIOUS CONDUCT IS UNCONSTITUTIONAL REGARDLESS OF WHETHER IT IMPOSES A SUBSTANTIAL BURDEN ON SUCH CONDUCT

Petitioners contend that there is a conflict among the courts of appeals over the Third Circuit's determination that "[u]nder *Smith* and Lukumi . . . there is no substantial burden

requirement when government discriminates against religious conduct." Pet. App. at 41a. This is simply not accurate. As the Third Circuit correctly noted, where the government discriminates against religious conduct, *Smith* and *Church of the Lukumi* unequivocally state that courts are to refrain from evaluating the extent that government actions impose a burden on the religious conduct. *See Smith*, 464 U.S. at 887 & n.4; *Church of Lukumi*, 508 U.S. at 53; *see also Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001) (discrimination against religious conduct is constitutionally prohibited even without proof that religious observance has been "substantially burdened.").

This Court stated in *Smith*:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim . . . [To require otherwise would mean that] courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice Blackmun's terminology, post, at 919) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use Justice O'Connor's

> terminology, post at 899) suffices to permit us to confer [a religious] exemption. It is . . . horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

494 U.S. at 887-89 (internal citations omitted); *see Church of the Lukumi*, 508 U.S. at 531-32 (a law that is not neutral or generally applicable must be justified by a compelling government interest and must be tailored to advance that interest; no mention, discussion or analysis of substantial burden). The court of appeals applied this precept in a straightforward manner to the facts of this case.

While the court of appeals set out a purported conflict among the circuits at footnote 31 of its opinion, Pet. App. at 42a, respondents respectfully submit that these cases are not inconsistent with the Third Circuit's opinion in this case. These cases comport with the notion that substantial burden analysis should be employed when government action incidentally impinges on religious conduct, and such analysis is not necessary if it is determined that the government action specifically targets and/or discriminates against religious conduct. Under the facts of this case, the court of appeals was correct in concluding that petitioners specifically targeted and discriminated against Orthodox Jews.

Finally even if there is a requirement that "substantial burden" has to be shown, it is undisputed that without the eruv "Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath." Pet. App. at 4a. This undoubtedly satisfies the substantial burden standard. Indeed, even the district court recognized that for observant Jews, the eruv "significantly enhances the practice of their religion." Pet. App. at 70a.

IV. THERE IS NO SPLIT IN THE CIRCUITS ON WHETHER PERMITTING AN ERUV VIOLATES THE ESTABLISHMENT CLAUSE, AND THERE IS NOTHING IN THE RECORD TO SUPPORT PETITIONERS' CLAIM THAT VIOLATING THE ESTABLISHMENT CLAUSE WAS EVER A CONCERN, LET ALONE A VALID CONCERN

Petitioners' final claim is that this case raises the issue of whether a potential Establishment Clause violation is a compelling interest that justifies a municipality's selective restrictions on a religious group. Prior to the district court's decision, however, petitioners *never* claimed that permitting the eruv would be a violation of the Establishment Clause. Quite to the contrary, the Borough Attorney publicly stated at the meeting of December 12, 2000, at which the Council voted to remove the eruv, that he had advised the Council that, pursuant to the decision of the District Court for the District of New Jersey in *ACLU of New Jersey* v. *City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987), approval of the eruv would not be a violation of the Establishment Clause. JA at A308-09. And, it was undisputed by the parties in the district court that a local government does not violate the Establishment Clause when it permits Orthodox Jews to maintain an eruv at no public expense. *City of Long Branch; see also Smith* v. *Community Bd. No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd*, 518 N.Y.S.2d 356 (2d Dep't 1987); Pet. App. 124a. Only amicus American Civil Liberties Union-New Jersey raised this issue in the District Court. No case has held to the contrary.[2]

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[2] Moreover, this Court has suggested that a subjective fear of Establishment Clause violations is not sufficient to overcome First Amendment rights exercised on public property. *See e.g.*, *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 839-46 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384,

Finally, Petitioners' contention that the court of appeals analyzed this issue under the wrong test is incorrect. The court of appeals did not "dismiss the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)." Pet. at 7. While the court of appeals primarily analyzed this claim under the "endorsement test," Pet. App. at 50a-57a, the court also analyzed each of the three prongs of the *Lemon* test and concluded that "[t]o the extent that the *Lemon* test retains some trace of vitality . . . it does not support the Borough's Establishment Clause defense." Pet. App. at 57a, n.41. And, the Third Circuit's analysis was driven by the unique facts of this case—that the Borough had permitted or sponsored a wide variety of religious uses of public property—church signs on the right of way, a creche in a public park, a Good Friday march, Santa Claus in Borough Hall, and an Easter egg hunt outside Borough Hall. JA at A425, A432-36, A444-45, A748, A871, A975-79.

394-95 (1993); *cf. also Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001) (it is not at all "clear whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination").

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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